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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

CITY OF FORT SMITH, ARKANSAS,
Petitioner,

v.

ALBERT KRANTZ, RON DECKER, and
DON SWEAT, On Behalf Of Themselves and
Others Similarly Situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a municipal ordinance that prohibits placing handbills and other hand-distributed advertisements, without reference to content, upon unattended privately owned vehicles located upon public streets and other public rights-of-way is facially unconstitutional, where the ordinance otherwise allows distributing such handbills and advertisements to any occupant of a vehicle who is willing to receive it?

II. Whether the decision of the court of appeals in awarding the Respondents attorney's fees pursuant to 42 U.S.C. § 1988 as a "prevailing party" for services rendered only on appeal is in conflict with this Court's decision in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), where the Respondents only appealed from the district court's grants of summary judgment in favor of the Petitioner and the other municipal defendants to this action, and where the court of appeals reversed these judgments and remanded the case back to the district court for further proceedings?

PARTIES TO THE PROCEEDING

Petitioner is the City of Fort Smith, Arkansas, a municipal corporation organized under the laws of the State of Arkansas. Respondents are Albert Krantz, Ron Decker, and Don Sweat, who purport to represent members of the Twentieth Century Holiness Tabernacle Church. The cities of Alma, Dyer, and Van Buren, Arkansas have previously been parties to this action and are believed to also be filing a Petition for Writ of Certiorari to this Court.

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Petitioner, the City of Fort Smith, Arkansas, respectfully requests that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 160 F.3d 1214 (8th Cir. 1998) and can be found at Appendix A (App. 1a). The order of the United States Court of Appeals for the Eighth Circuit awarding the Respondents' attorney's fees for services rendered on appeal is not published but can be found at Appendix B (App. 21a).

The United States District Court for the Western District of Arkansas entered two memorandum opinions and judgments in this case. The memorandum opinion and judgment entered July 30, 1997 can be found at Appendix C (App. 23a). The memorandum opinion and judgment entered November 27, 1996 can be found at Appendix D (App. 30a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on November 30, 1998. Thereafter, a request for rehearing and rehearing en banc was timely filed by the Petitioner. The Eighth Circuit denied this request on January 29, 1999. This Petition for Writ of Certiorari is filed within ninety days from the entry of the order by the Eighth Circuit denying the petition for rehearing and for rehearing en banc.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE AND MUNICIPAL ORDINANCE MATERIAL TO THIS PETITION

Title 42, United States Code, § 1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

City of Fort Smith, Arkansas, Municipal Ordinance § 14-51(c):

> It shall be unlawful for any person to place or deposit any commercial or noncommercial handbill or other hand distributed advertisements upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, or alley within the city, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.

STATEMENT OF THE CASE

In order to control and prevent the spread of litter, to promote aesthetics, and to protect the safety interests of the public, the Petitioner, the City of Fort Smith, Arkansas (hereinafter the "City"), enacted an ordinance (hereinafter the "ordinance") in 1981 that, among other things, prohibited placing handbills and other hand-distributed advertisements upon privately owned vehicles located upon public rights-of-way within the City unless an occupant of the vehicle was there willing to receive it.[1] The Respondents are members of the Twentieth Century Holiness Tabernacle Church who have disseminated religious information through a variety of different mediums within the City as well as in the cities of Alma, Dyer, and Van Buren, Arkansas, who have also been parties to this action. On occasion, the Respondents have distributed their literature by placing handbills on, and sometimes in, unattended vehicles parked on public streets, parking lots, and other public rights-of-way within the City. While doing so, some of the Respondents have been arrested and subsequently prosecuted for violating the ordinance.

On June 30, 1995, the Respondents filed a complaint in the United States District Court for the Western District of Arkansas against the City, its mayor, and the individual members of its board of directors, along with the City of Van Buren, Arkansas and a number of other individuals. In their complaint, the Respondents alleged that the City, through enactment and enforcement of the City's ordinance, violated the Respondents' constitutional rights of free speech and religion. The Respondents sought a permanent injunction

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[1] App. 51a-54a. The complete version of the City's ordinance is set forth at App. 71a-72a.

enjoining the City from future enforcement of the ordinance and monetary damages pursuant to 42 U.S.C. § 1983 by reason of past enforcement activities by the City and others with respect to the City's ordinance. (App. 36a.) Specifically, the Respondents contended that: (1) the City's ordinance was facially unconstitutional under the First Amendment on overbreadth and vagueness grounds; (2) the ordinance was enacted with a discriminatory purpose; and (3) the ordinance was selectively enforced against them.

On November 17, 1995, the Respondents' complaint was consolidated by the district court with a similar complaint filed by the Respondents against the cities of Alma and Dyer, Arkansas. On May 21, 1996, the district court ruled that the Respondents could pursue their constitutional claims as a class, with the class being composed of individuals who have been arrested for violation of the ordinance, individuals who have been threatened with arrest for violation of the ordinance, and individuals who desired to distribute handbills but refrain from doing so because of a reasonable belief that they may be arrested for violation of the ordinance. (App. 36a.) In addition, the district court stayed the Respondents' monetary claims brought pursuant to 42 U.S.C. § 1983 pending resolution of their class action constitutional challenge to the ordinance. *Id.*

On October 18, 1996, the City filed a motion for judgment on the pleadings, contending that the City's ordinance was facially valid. On November 27, 1996, the district court granted the City's motion, holding that the City's ordinance was not unconstitutionally overbroad or vague. The district court found the City's ordinance narrowly tailored to serve significant governmental interests, *i.e.* the reduction of litter on public streets, the promotion of aesthetics, and the protection of the public's safety interests, without reference to

the content of the speech, and the ordinance left ample alternative means of communication open in that it did not prohibit distributing handbills to any person willing to accept them. (App. 40a-58a.)

On December 5, 1996, the City filed a motion for summary judgment on the Respondents' claims that the City's ordinance was adopted with a discriminatory purpose and that the City selectively prosecuted the Respondents under this ordinance resulting in a discriminatory effect on the Respondents. On July 30, 1997, the district court granted the City's motion for summary judgment on these claims. (App. 27a-29a.) On August 28, 1997, the Respondents filed a notice of appeal from the district court's order of November 27, 1996, granting judgment to the City on the Respondents' facial challenge to the ordinance as well as the district court's order of July 30, 1997, granting judgment to the City on the Respondents' remaining claims. (App. 69a.)

The Respondents' appeal of the decisions of the district court came before the United States Court of Appeals for the Eighth Circuit. The Respondents argued that the district court erred in granting summary judgment to the City on the Respondents' three claims under the free speech clause of the First Amendment. On November 30, 1998, the Eighth Circuit reversed the decisions of the district court and remanded the case for further proceedings, ruling that the City's ordinance was facially invalid on First Amendment overbreadth grounds. (App. 20a.) The Eighth Circuit did not address the Respondents' arguments concerning the claims of selective enforcement and discriminatory enactment. *Id.* Thereafter, the City timely filed a petition for rehearing and rehearing en banc, which was denied on January 29, 1999.

Following the filing of the opinion by the Eighth

Circuit on November 30, 1998, the Respondents filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988(b) for services rendered only on appeal. In response to this motion, the City maintained that the Respondents were not a "prevailing party" under this statute, as that term has been defined by this Court, and therefore they were not entitled to an award of attorney's fees. On April 13, 1999, the Eighth Circuit awarded the Respondents attorney's fees in the amount of $51,525.00 for services rendered on appeal. (App. 21a.)

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE CITY'S ORDINANCE WAS NOT WITHIN THE CONSTITUTIONAL PARAMETERS PRONOUNCED IN THE DECISIONS OF THIS COURT.

The challenged portion of the City's ordinance prohibits the placement of handbills and other hand-distributed advertisements upon unattended, privately owned vehicles located upon a street or other public right-of-way. (App. 72a.) However, the ordinance does not interfere with, but rather expressly affords, the right to engage in traditional handbilling activities, namely tendering a handbill to those willing to receive it, both on public and private property. Moreover, under the ordinance, handbills and advertisements may be distributed to any occupant of a privately owned vehicle who is there willing to receive it. (App. 71a-72a.)

In reversing the judgments entered by the United States District Court for the Western District of Arkansas, the Court of Appeals for the Eighth Circuit held this portion of the City's ordinance was facially unconstitutional on overbreadth

grounds. In its decision, the Eighth Circuit, finding the ordinance to be a content-neutral regulation on First Amendment activities in a *public forum*, reviewed the ordinance to determine whether it was a reasonable time, place and manner restriction.[2] The Eighth Circuit went on to hold that this particular section of this ordinance "suppress[ed] considerably more speech than is necessary" to serve the stated governmental purposes of controlling and preventing the spread of litter, promoting aesthetics and protecting the safety interests of the public in and around the public rights-of-way. (App. 18a, 51a.)

Specifically, the Eighth Circuit held that since the person who either owns or possesses the vehicle could place "a sign on the dashboard" of their unattended vehicle indicating that they did not wish to accept any, most, or certain handbills and/or advertisements, or they could otherwise "notify" all potential handbill distributors that handbills and/or advertisements are not to be placed on the vehicle, then the City's ordinance suppressed "substantially more speech than necessary." (App. 16a, 18a.) The decision of the Eighth Circuit rests on the presumption that a privately owned vehicle temporarily parked on a public right-of-way is

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[2] App. 3a-4a, 6a-7a, 11a-12a, 19a-20a. In addition, the Eighth Circuit stated in its decision that the City "concede[d] that public streets and parking lots are public forums . . ." App. 11a. To a limited extent, this statement is true. However, the City has maintained throughout this case that a *privately owned* vehicle temporarily parked on a public right-of-way is not, in and of itself, a public forum. It should be added that the district court also reviewed the City's ordinance as a limitation on speech in a "public" forum. App. 46a-56a. Because the district court nevertheless held that the ordinance constitutional, this finding was not appealed by the City.

open as a public forum on which all members of the public have the constitutional right to express their views upon, even without the prior consent of the owner or driver of the vehicle. The only way, according to the Eighth Circuit, to rebut this presumption is for the owner or driver to post a "sign" on their vehicle that states otherwise.

The Eighth Circuit emphasized that ordinance did not take into account the possibility that an owner or driver of an unattended vehicle temporarily parked on a public right-of-way "might wish to receive the handbill," even though they were away from their vehicle at the time the handbill would have otherwise been offered to them. (App. 18a.) However, in its decision, the Eighth Circuit did not address the facts that the ordinance recognizes and respects traditionally handbilling and leafletting activities and that the ordinance expressly allows handbills and advertisements to be distributed to any occupant of a vehicle who is there willing to receive it.

A. The Eighth Circuit erred in holding that an unattended, privately owned vehicle temporarily parked on a public right-of-way is a public forum open to any member of the public to exercise First Amendment activities upon, all without the prior consent of either the owner, driver or an occupant of the vehicle.

As stated, the Eighth Circuit evaluated the City's ordinance as a time, place and manner restriction on First Amendment activities in a *public* forum.[3] By doing such, the Eighth Circuit converted an otherwise private forum, *i.e.* a

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[3] *See supra* note 2.

privately owned vehicle parked on a public right-of-way, into a *de facto* public forum where any member of the public may constitutionally express their view, all without the prior consent of either the owner, driver or an occupant of the vehicle. The Eighth Circuit's decision is in conflict with the decisions of this Court regarding public versus private forums.

It is true that several decisions of this Court have held that streets and the like are traditional public forums because of their long history of being used for public assembly, debate, and other exercises of First Amendment rights. *See e.g. Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *Hudgens v. N.L.R.B.*, 424 U.S. 507, 515 (1976); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). Yet, here, the vehicle itself, not the area surrounding the vehicle, is the forum. In this regard, this Court has never held that privately owned property, *i.e.* an unattended, privately owned vehicle temporarily parked on a public street or parking lot, is a public forum for First Amendment purposes.

Rather, absent some history or practice of members of the public using a particular setting as a forum for First Amendment activities, regulations limiting or even banning First Amendment activities upon such a setting have been upheld as valid by this Court. *See United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981) ("*Council of Greenburgh*"); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Greer v. Spock*, 424 U.S. 828, 836-37 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *see also Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800-09 (1985); *cf. International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 830 (1992). In these decisions, this

Court emphasized the importance of distinguishing between public and private forums when scrutinizing a regulation affecting speech. If the regulation affects speech in a public forum, this Court has subjected the regulation to more careful scrutiny. *See Cornelius*, 473 U.S. at 800, 807-09; *Council of Greenburgh* , 453 U.S. at 131-33, n. 7; *Lehman*, 418 U.S. at 302-04. On the other hand, if the regulation affects speech in a non-public setting, then the restriction need only satisfy a requirement of reasonableness. *Id.*

For instance, in *Council of Greenburgh*, *supra*, this Court held that a nonprofit civic organizations' First Amendment rights were not violated by a federal statute that completely banned depositing unstamped materials in mailboxes. *Council of Greenburgh*, 453 U.S. at 131-33. This Court found that such a setting had not "traditionally" been a First Amendment forum open to members of the public, and as such, the post office's complete ban on such First Amendment activities was constitutional. *Id.* Likewise, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974), this Court held that a public city bus is not a public forum. This Court went on to hold that a municipality's refusal to sell space for political and issue advertising on buses was not unconstitutional.

Again, in *Greer v. Spock*, 424 U.S. 828, 836-38 (1976), this Court held that simply because a military installation was open at times to members of the public, this in and of itself did not create a public forum for First Amendment purposes. This Court went on to hold that a ban on the distribution of leaflets without the prior consent of the military base commander was constitutional. *Id.* at 837-40. In reaching this decision, this Court noted that there is no constitutional law principle that a place becomes a "public forum" for purposes of the First Amendment whenever

members of the public are permitted to freely access it. *Id.* at 837-39. This Court emphasized that the guarantees under the First Amendment do not mean that people who want to express their views have "a constitutional right to do whenever and however and wherever they please." *Id.*; *see also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 830 (1992) (holding that a municipal airport terminal is not a public forum for First Amendment purposes); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (holding that a prison is not a public forum). Finally, in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), this Court held that a privately-owned shopping center, although open to members of the public, is not a public forum where members of the public had a First Amendment right to distribute handbills.

Despite the decisions of this Court, the Eighth Circuit improperly reviewed the City's ordinance as a time, place and manner restriction on free speech in a *public* forum, and thereafter concluded that it did not leave open to the Respondents ample alternative channels of communication. (App. 18a.) Under the decisions of this Court, a privately owned vehicle parked on a public right-of-way is not a public forum. *See Cornelius*, 473 U.S. at 800-09; *Council of Greenburgh*, 453 U.S. at 129; *Greer*, 424 U.S. at 836-37; *Lehman*, 418 U.S. at 303-04; *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). Accordingly, the Eighth Circuit erred in failing to review this ordinance to determine whether it satisfied the requirement of reasonableness. As established herein, the City's ordinance is reasonable. However, assuming the City's ordinance regulates speech in a public forum, nevertheless, it is constitutional in light of the decisions of this Court regarding the regulation of speech in

public forums.[4]

As a result of the Eighth Circuit's decision, simply parking one's vehicle on a public street or other right-of-way creates a public forum where all members of the public have a constitutional right to place leaflets, circulars, advertising, placards, signs and other items upon without restriction and without the prior consent of the owner, driver, or any occupant of the vehicle. Consequently, the Eighth Circuit essentially abrogated one of the traditional privileges of owning private property: the right to be free from those seeking to advocate their message, whether commercial or otherwise, notwithstanding this Court's refusal to declare a constitutional right to force one's message into, or onto, a nonpublic forum. *See e.g. Council of Greenburgh, supra*; *Lehman, supra*; *Lloyd Corp. v. Tanner, supra*; *Miami Herald Publishing Co. v. Tronillo*, 418 U.S. 241 (1974).

B. The Court of Appeals for the Eighth Circuit erred in holding the City's ordinance facially unconstitutional.

Assuming that a privately owned vehicle parked on a public right-of-way is a public forum open to all members of the public, nevertheless, the decision of the Eighth Circuit is contrary to the well established constitutional parameters and First Amendment principles pronounced by this Court in *Schneider v. State*, 308 U.S. 147 (1939) ("*Schneider*"), *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) ("*Vincent*"), and *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 40 (1981) ("*Heffron*"). The City's ordinance regulates the throwing down or depositing of

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[4] *See* Sec. I(B).

handbills and advertisements in the absence of any specifically intended receiver or recipient, *i.e.* littering, but expressly permits the distribution of such materials to anyone who is there "willing to accept it." (App. 72a.) By so doing, the City has promulgated a regulation that is well within these constitutional parameters and affords the constitutional protections pronounced in these decisions.

Specifically, in *Schneider*, *supra,* this Court declared unconstitutional four municipal ordinances that, among other things, prohibited distribution of all handbills in the public streets. *Schneider*, 308 U.S. at 161-62. Analyzing these ordinances as restrictions of First Amendment activities in a public forum, this Court stated that the cities' "purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street *from handing literature to one willing to receive it*." *Id.* at 162 (emphasis added). However, this Court stressed that "[t]his constitutional protection does not deprive a city of all power to prevent street littering," nor "does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast into the streets." *Id.* at 160, 162. Recognizing the duty of municipalities to take reasonable measures to curtail the spread of litter, this Court stated that "[d]oubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty." *Id.* at 165.

It is uncontroverted that the challenged section of the City's ordinance in no way infringes upon, but rather completely allows, individuals the unfettered opportunity to exercise the constitutional right pronounced by this Court in

Schneider and in decisions similar to *Schneider*.[5] Not only does the ordinance allow the distribution of handbills and advertisements to people on streets, sidewalks, public parks, public rights-of-way, and private property who are willing to receive them, it also allows distribution of such materials to any owner, driver, or occupant of a vehicle who is willing to accept them. This is precisely what *Schneider* mandates. Notwithstanding this, the decision of the Eighth Circuit invalidates the City's ordinance as suppressing "substantially more speech than necessary." (App. 18a.) Such a decision runs afoul of *Schneider* and other decisions of this Court.[6]

Not only does the decision of the Eighth Circuit distend the constitutional parameters heretofore established by this Court in *Schneider*, it simultaneously negates the recognized power of a municipality to prevent and control litter and to protect aesthetics in a manner such as that utilized by the City. In *Vincent*, *supra*, this Court reviewed a municipal ordinance that prohibited the posting of temporary signs on public property, regardless of their content, as a restriction of First Amendment activities in a public forum. *Vincent*, 466 U.S. at 791, 808. The purpose behind the ordinance was to combat "litter and visual blight." *Id.* at 794. In rejecting the argument that the municipal ordinance was overly broad and thus unconstitutional, this Court relied on its prior holding in *Schneider*. *Id.* at 808-10. In comparing *Schneider* with the case *sub judice*, this Court stated:

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[5] Both before and after *Schneider*, this Court has held that a municipality may not prophylactically prohibit *direct* distribution of handbills to those willing to receive them. *See Talley v. California*, 362 U.S. 60 (1960); *Jamison v. Texas*, 318 U.S. 413 (1943); *Lovell v. Griffin*, 303 U.S. 444 (1937).

[6] *See supra* note 5.

> [In *Schneider*] [i]ndividual citizens were actively exercising their right to communicate *directly* with potential recipients of their message. *The conduct continued only while the speakers or distributors remained on the scene.* In this case, appellees posted dozens of temporary signs throughout an area where they would *remain unattended until removed.* As the Court expressly noted in *Schneider*, the First Amendment does not "deprive a municipality to enact regulations against throwing the literature broadcast into the streets. Prohibition of such conduct would not abridge their constitutional liberty since such activity bears no necessary relationship to their freedom to speak, write, print or distribute information or opinion."

Id. at 809 (emphasis added). To leave no doubt, the Court clarified what activities were protected in *Schneider* and those that were not. This Court stated that "[t]he right recognized in *Schneider* is to tender the written material to the passerby who may reject or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground." *Id.* at 809-10.

This Court noted in *Vincent* that, notwithstanding the fact that the posting of signs on public property had certain advantages over other forms of expression, there is no reason to believe that the same advantages could not be obtained through other means, and there is nothing to indicate that one's ability to communicate directly with the citizens on the street was threatened by the ordinance. *Id.* at 812. Holding that the ordinance was a reasonable time, place, and manner restriction, this Court concluded that a municipality's interests

in aesthetics and in combating visual blight "are sufficiently substantial to justify this content neutral, impartially administered prohibition against the posting of temporary signs on public property and that such an application of the ordinance does not create an unacceptable threat to the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 817. In sum, this Court in *Vincent* affirmed the right of individuals to communicate their messages directly to those willing to receive them, but refused to create a constitutional right to place that written message "throughout an area where [the written message] would remain unattended until removed." *Id.* at 809.

In addition to this Court's decisions in *Schneider* and *Vincent*, this Court has upheld the validity of a time, place and manner restriction on the distribution of handbills in a pubic forum more uncompromising than the limitations contained in the City's ordinance. In *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 40 (1981) ("*Heffron*"), this Court examined the validity of a regulation that restricted the distribution of handbills to only a designated booth at a state fairground. A religious organization claimed that this regulation suppressed its religious ritual of going into public places and distributing literature in support of their religion. Finding the regulation was a content-neutral restriction on First Amendment activities in a public forum, this Court examined it to determine whether it was a valid time, place and manner restriction. *Heffron*, 452 U.S. at 648-49. Rejecting the argument that there were less restrictive means of furthering the state's interests in protecting the safety and convenience of persons using a public forum, such as penalizing disorder and disruption or placing more narrowly drawn restrictions on the location and movement of handbill distributors, this Court found that there were alternative

alternative forums for expression of the religious organization's protected speech. *Id.* at 653-55.

Indeed, in *Heffron*, this Court recognized that the regulation did not exclude members of the religious organization from the fairgrounds, nor did it deny the organization the right to conduct any desired activity at some point within this forum, such as the members mingling with the crowd and orally propagating their views to those willing to listen. *Id.* at 654-55. Consequently, members of this religious organization, as well as other organizations, were provided adequate means to spread their message on the fairgrounds despite the regulation. *Id.* This Court concluded that although the "First Amendment protects the rights of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention,'" the subject regulation did not unnecessarily limit that right. *Id.* at 655 (*quoting Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

The decision of the Eighth Circuit not only conflicts with, but annuls the established parameters of the constitutional protections pronounced by this Court in *Schneider*, *Vincent* and *Heffron*. In keeping with these decisions, the City has enacted an ordinance that completely protects the First Amendment rights recognized in *Schneider* and other decisions of this Court, namely the right to freely disseminate one's views via handbills directly to those willing to receive them, while simultaneously promoting the City's aesthetic and safety interests through means approved by this Court as constitutional in *Vincent* and *Heffron*.

Certainly, since a municipality may constitutionally prohibit the placement of temporary signs on public property, *see Vincent*, *supra*, or limit direct distribution in a public forum to a designated location, *see Heffron*, *supra*, then at the

absolute very least, a municipality may enact an ordinance prohibiting the placement of handbills and advertisements upon unattended, privately owned vehicles temporarily parked on public rights-of-way. Certainly, less constitutional protections are typically afforded to an individual seeking to express his views upon privately owned property, not his own, *i.e.* a private forum, than to that same individual seeking to express his views upon public property. *See e.g. United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129-33 (1981); *Greer v. Spock*, 424 U.S. 828, 836-38 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

For instance, in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), this Court held that a municipality may constitutionally limit space on signs on its buses to only commercial and public service advertising while refusing to sell space for political and issue advertising. In *Greer v. Spock*, 424 U.S. 828, 836-38 (1976), this Court held reasonable a regulation that, among other things, prohibited the distribution of literature on a military base without the prior consent of the base's military commander. In *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129-33 (1981), this Court held reasonable a federal statute prohibiting depositing in mailboxes unstamped materials, regardless of their content. Again, in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), this Court held there was nothing unconstitutional in a shopping center, which was not a public forum although otherwise open to members of the public, banning distributors of handbills from the center.

In addition, the decision of the Eighth Circuit runs afoul with this Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The Eighth Circuit held that since the owner or driver of a vehicle located upon a public

right-of-way could place "a sign on the dashboard" of her unattended vehicle indicating that she did not wish to accept any, most, or certain handbills, then as a time, place and manner restriction, the City's ordinance suppressed "considerably more" speech than necessary. (App. 16a-18a.) Under *Ward*, *supra*, in order for the City's ordinance to pass constitutional muster as a reasonable time, place and manner restriction, assuming the City's ordinance is such, the ordinance need not be the least restrictive means of achieving the ordinance's goals. Rather, this Court held that such a restriction passes muster "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799-800 (quoting *United States v. Albertini*, 472 U.S. 677 (1985)). Despite this Court's decision in *Ward*, the Eighth Circuit mandated the absolute least restrictive means of regulating the distribution of handbills and advertisements upon unattended vehicles parked on public rights-of-way. This decision was in error.

Moreover, the Eighth Circuit's holding that the City's ordinance did not leave open alternative channels of communication is neither supported by the foregoing decisions of this Court nor the facts of this case. The Eighth Circuit reasoned that if an owner or driver of a vehicle did not want handbills placed on or in their vehicle when it is left parked on a public right-of-way, then they "can quite easily notify distributors of that fact," whoever those potential distributors may be, wherever they may be located, and however they may be notified. (App. 18a.) Yet, the City's ordinance freely allows the Respondents and others the opportunity to spread their message either orally or through handbills to those who are willing to receive it. This is precisely what this Court has required in its decisions on this issue. *See Schneider*, *supra*; *Heffron*, *supra*; *Vincent*, *supra*. Handbilling and leafletting as

a channel of communication for the Respondents' message has been preserved, and along with this, other ample avenues for the dissemination of expressive ideas remain unaffected by the City's ordinance.[7]

Finally, in support of its decision, the Eighth Circuit left only impractical and unreasonable means for the owner or driver of a vehicle to prevent it from becoming a public forum upon which members of the public may express their views. According to the court, to avoid having one's vehicle become a public forum, one must "plac[e] a sign on the dashboard" of the vehicle or somehow "notify distributors" that he "do[es] not wish to be left with handbills." (App. 16a, 18a.) Yet, in today's ever-mobile society, which has a variety of people possessing different levels of education and speaking and reading a wide variety of languages, all of whom are driving a variety of vehicles, it is all too unlikely that this will curtail unwanted leafleting and advertising on temporarily unattended vehicles. There is no practical way to ascertain who will be distributing handbills, what the contents of the handbills will be, and the times and locations handbilling will be attempted. In addition, the Eighth Circuit's decision opens the door for distributors of handbills and advertisements to use more permanent and objectionable means of expressing their views

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[7] For example, the City's ordinance does not prevent the Respondents from distributing their literature to those willing to receive it, both on public and private property, from remaining on the public sidewalks and parking lots until the owner or occupant of a vehicle returns to the vehicle where at that time the Respondents' message could be directly conveyed, from mailing their handbills directly to residents, from transmitting messages through the use of telephone lines, including electronic and computer media, and from utilizing broadcast and radio media and newspapers.

upon a privately owned, unattended vehicle, such as stickers, signs, placards and other more intrusive items, all without the prior consent of the owner or driver of the vehicle who has temporarily left the vehicle unattended on a public parking lot or street.

In sum, the City's ordinance provides every citizen ample opportunity to communicate their views in order to "reach the minds of willing listeners." *Heffron*, 452 U.S. at 655. Nothing in the City's ordinance infringes on the rights of the Respondents to distribute handbills and advertisements to those actually willing to receive them, regardless of whether the Respondents are distributing such materials on public or private property. Rather, the ordinance is in keeping with the duty of the City, as trustee for the public, to combat visual blight and promote aesthetics by, among other things, maintaining its streets and rights-of-way free from papers placed indiscriminately on unoccupied, privately owned vehicles where the papers "remain unattended until removed." *Vincent*, 466 U.S. at 809. Simply put, a limitation on indiscriminately placing handbills and advertisements on privately owned vehicles parked on public property "does not create an unacceptable threat to the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Schneider*, 308 U.S. at 817.

II. THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT AWARDING THE RESPONDENTS ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988(b) WAS CONTRARY TO THIS COURT'S DECISION IN *HANRAHAN v. HAMPTON*.

As previously noted, the Respondents brought this action against the City and the other municipalities seeking a permanent injunction from future enforcement of the ordinances in question and monetary damages by reason of past enforcement activities pursuant to 42 U.S.C. § 1983. (App. 36a.) The Respondents' 42 U.S.C. § 1983 claims were stayed pending resolution of their class action constitutional challenge to the City's ordinance. *Id.* The district court eventually granted the City's motions for summary judgment and denied the Respondents' motion for declaratory relief, which the district court treated as a motion for judgment on the pleadings. (App. 5a.) Thereafter, the Respondents filed a notice of appeal. In their notice of appeal, the Respondents appealed only from the district "Court's order of November 27, 1996, granting summary judgment to the Defendants, which is now a final appealable order; and the [district] Court's order of July 30, 1997, granting judgment for Defendants." (App. 69a.) The Respondents did not appeal any other decisions of the district court.

On appeal, the Court of Appeals for the Eighth Circuit reversed and remanded this action to the district court for further proceedings consistent with its opinion. (App. 20a.) Thereafter, the Respondents filed a motion for attorney's fees for services rendered only on appeal pursuant to 42 U.S.C. § 1988(b). (App. 64a-67a.) In response, the City argued that under controlling precedent of this Court, an award of

attorney's fees for services rendered on appeal pursuant to 42 U.S.C. § 1988(b) was not authorized at that stage of the proceedings.

Under 42 U.S.C. § 1988(b), in an action brought pursuant to 42 U.S.C. § 1983, "the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (emphasis added). In *Hanrahan v. Hampton*, 446 U.S. 754 (1980) ("*Hanrahan*"), this Court was presented with the question of under what circumstances is a party deemed a "prevailing party" within the meaning of this statute. In *Hanrahan*, the plaintiffs brought a civil rights action against several defendants pursuant to 42 U.S.C. § 1983 and two other civil rights statutes. At trial, upon the closing of the plaintiffs' case, the district court granted directed verdicts in favor of a majority of the defendants. *Hanrahan*, 446 U.S. at 760. Ultimately, the jury deadlocked on the liability of the remaining defendants, and the district court subsequently entered a final judgment directing verdicts in favor of all the defendants. *Id.* On appeal, the Court of Appeals for the Seventh Circuit vacated the district court's judgment and ordered a new trial as to all but four of the defendants. *Id.* In addition, the Seventh Circuit awarded the plaintiffs attorney's fees pursuant to 42 U.S.C. § 1988 based upon a belief that the plaintiffs "had prevailed with respect to the appeal in this case." *Id.* at 756. This conclusion was based on the fact that the plaintiffs had obtained favorable appellate rulings, namely the reversal of the district court's judgment directing verdicts against them and remanding the case back to the district court for a full trial on the merits. *Id.*

In determining whether the plaintiffs in *Hanrahan* were a "prevailing party," this Court reviewed the legislative

history of 42 U.S.C. § 1988(b). This Court found that "Congress intended to permit the interim award of a counsel fees only when a party has prevailed on the merits of at least some of his claims." *Id.* at 757-58. This Court went on to find that inasmuch as the Seventh Circuit had only held that the plaintiffs were entitled to a trial of their cause, then "as a practical matter they are in a position no different from that they would have occupied if they had simply defeated defendants' motion for a directed verdict in the trial court." *Id.* at 758-59. Holding that the plaintiffs were not a "prevailing party" within the meaning of 42 U.S.C. § 1988(b) at the current stage of the proceedings, this Court reversed the judgment of the Court of Appeals for the Seventh Circuit awarding the plaintiffs attorney's fees pursuant to the statute. *Id.*

Under this Court's holding in *Hanrahan*, the Court of Appeals for the Eighth Circuit clearly erred in awarding the Respondents attorney's fees incurred on appeal pursuant to 42 U.S.C. § 1988 in light of the procedural posture of these proceedings. As previously stated, the Respondents appealed only from the district court's granting of summary judgment to the City. Similar to the plaintiffs in *Hanrahan*, the Respondents here succeeded only in having the district court's granting of summary judgment reversed and having the case remanded back to the district court, presumably for a full trial of their cause. *Hanrahan*, 446 U.S. at 758-59. Thus, although the district court's granting of summary judgment was reversed, the Respondents have yet to "prevail[] on the merits of their claims." *Id.* at 758. This can occur only at a subsequent trial on the merits before the district court. Therefore, the decision of the Court of Appeals for the Eighth Circuit awarding the Respondents' attorney's fees pursuant to 42 U.S.C. § 1988(b) was clearly in conflict with this Court's decision in *Hanrahan*. For this alternative reason, this

Petition for Writ of Certiorari should be granted.

CONCLUSION AND PRAYER

The Court of Appeals for the Eighth Circuit erred in reversing the decision of the United States District Court for the Western District of Arkansas. A municipal ordinance which permits the distribution of handbills and advertisements to any occupant of a vehicle willing to receive it, but prohibits placing or depositing any such handbill or advertisement upon an unattended vehicle located upon a public right-of-way, is not facially unconstitutional, but is well within the constitutional parameters and affords the constitutional protections pronounced by the decisions of this Court.

Furthermore, the Court of Appeals for the Eighth Circuit erred in awarding the Respondents attorney's fees pursuant to 42 U.S.C. § 1988. Clearly, under this Court's decision in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the Respondents were not a "prevailing party" within the meaning of the statute, and consequently, an award of attorney's fees at that stage of these proceedings was not authorized.

The City of Fort Smith, Arkansas, prays that this Court grant this Petition for Writ of Certiorari, and upon due consideration, reverse the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3359

[Filed: November 30, 1998]

Appeal from the
United States District Court
for the
Western District of Arkansas

ALBERT KRANTZ, RON DECKER, DONALD SWEAT, on behalf of themselves and others similarly situated, Appellants,	)
v.	)
CITY OF FORT SMITH, ARKANSAS; CITY OF VAN BUREN, ARKANSAS; CITY OF ALMA, ARKANSAS; CITY OF DYER, ARKANSAS, Appellees.	)

ALBERT KRANTZ, RON DECKER, DONALD SWEAT, on behalf of themselves and others similarly situated,
Appellants,

v.

CITY OF ALMA, ARKANSAS; CITY OF DYER, ARKANSAS,
Appellees.

Submitted: February 11, 1998
Filed: November 30, 1998

Before McMILLIAN and HANSEN, Circuit Judges, and DAVIS,[1] District Judge.

McMILLIAN, Circuit Judge.

Plaintiffs, members of the Twentieth Century Holiness Tabernacle Church ("the Church") who allegedly have been arrested or threatened with legal injury pursuant to any of four specific municipal ordinances[2] (collectively referred to as "the ordinances"), appeal from final judgments entered in the United States District Court for the Western District of Arkansas, dismissing with prejudice their action pursuant to

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota, sitting by designation.

[2] Alma, Ark., Ordinance No. 83-3; Dyer, Ark., Ordinance No. 83-4; Fort Smith, Ark., Municipal Code, art. III, § 14-51; and Van Buren, Ark., Ordinance No. 5-1983.

42 U.S.C. § 1983 against the Cities of Alma, Dyer, Fort Smith, and Van Buren, Arkansas (collectively defendants). Krantz v. City of Alma, Nos. 95-2135/95-2136 (WD. Ark. Nov. 27, 1996) (Krantz) (judgment dismissing with. prejudice complaint against Alma, Dyer, and Van Buren); id. (July 30, 1997) (memorandum opinion and judgment dismissing with prejudice complaint against Fort Smith). The district court granted summary judgment for defendants on plaintiffs' First Amendment claims seeking a declaration that the ordinances are unconstitutional because they prohibit plaintiffs from placing religious literature under the windshield wipers of unattended vehicles parked on public property. Id. (Nov. 27, 1996) (memorandum opinion) hereinafter "slip op."). For reversal, plaintiffs now argue that the district court erred in holding as a matter of law that the ordinances (1) are not facially invalid on First Amendment overbreadth grounds, (2) are not unconstitutional as applied to plaintiffs, and (3) were not enacted with a discriminatory purpose. In addition, defendant the City of Dyer challenges plaintiffs' standing. For the reasons stated below, we hold that plaintiffs have standing to sue the City of Dyer. We further hold that the ordinances are unconstitutional because they are facially overbroad restrictions on free speech. Accordingly, we do not reach the remaining issues raised on appeal. The judgments of the district court are reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

Background

Each of the ordinances makes it a misdemeanor for any person to place a handbill or advertisement on any other person's vehicle parked on public property within city limits,

unless an occupant of the vehicle is willing to accept the handbill or advertisement. For example., the Van Buren ordinance provides in relevant part:

> SECTION 3. It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill or other hand-distributed advertisement upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, [or] alley within the City of Van Buren, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.

Slip op. at 10 (quoting Van Buren, Ark., Ordinance No. 5-1983).[3]

According to plaintiffs, "[i]n their effort to 'preach the gospel to every living person in the earth,'" associates of the Church distribute religious literature by placing handbills under the windshield wipers of unattended parked cars. Brief for Appellants at 2. Plaintiffs filed this action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983, alleging that the ordinances are facially

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[3] The ordinances of the other three defendants contain substantially the same language as Section 3 of the Van Buren ordinance. Krantz v. City of Alma, Nos. 95-2135/95-2136, slip op. at 10 n.1 (W.D. Ark. Nov. 27, 1996) (memorandum opinion) (hereinafter "slip op.").

unconstitutional, that they are selectively enforced only against members of the Church, and that they were enacted with the discriminatory purpose of stopping the Church's handbilling activities, in violation of plaintiffs' First Amendment rights of free speech and free exercise of religion. The district court certified a plaintiff class, defined as individuals who have been arrested, have been threatened with arrest, or have refrained from distributing handbills because they reasonably believe they will be arrested under one of the ordinances. Plaintiffs moved for declaratory judgment, and defendants filed cross-motions for judgment on the pleadings and summary judgment. Plaintiffs thereafter amended their complaint, adding two new claims. Defendants then filed motions for judgment on the pleadings or partial summary judgment addressing plaintiffs' newly added claims.

By orders dated November 27, 1996, and July 30, 1997, the district court granted defendants' motions for judgment on the pleadings and summary judgment and denied plaintiffs' motion for declaratory relief, which the court treated as a motion for judgment on the pleadings. The district court held that defendants were entitled to judgment as a matter of law on plaintiffs' claim that the ordinances are facially invalid on overbreadth grounds. The district court reasoned:

> The Court is not altogether comfortable with the notion that these ordinances actually regulate handbilling -- and, therefore, speech or expression. To the contrary, the Court believes these ordinances regulate the conduct of littering -- the physical act of throwing down or depositing a piece of paper on public

> and private property. Nevertheless, since the Court believes that the effect of the ordinances -- at least to some limited extent -- can be construed as a limitation on handbilling activities, and since handbilling is an expressive activity protected by the First Amendment, the Court is of the view that the ordinances have some impact on expressive conduct.

Slip op. at 11.

The district court went on to state that it would analyze the First Amendment overbreadth issue using the constitutional standard applicable to public forums because the ordinances appeared to regulate both public and private forms of speech. Id. at 14-15. The district court noted that written forms of expression in public forums are subject to reasonable time, place or manner restrictions; but that the restrictions must (1) be content-neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels of communication. Id. at 15. The district court first determined that the ordinances are content-neutral. Id. at 16. The district court next concluded that the ordinances are narrowly tailored to serve a significant governmental interest. On that point, the district court noted that, although defendants are not required to show that their ordinances are the least restrictive means of accomplishing their objectives, they may not regulate expression so as to substantially burden more speech than necessary to advance legitimate governmental interests. Id. at 17 (citing Ward v. Rock Against Racism, 491 U.S. 781,798-800 (1989) (Ward)). The district court opined that the prevention of litter is a legitimate

governmental interest, id. at 19 ("It can certainly be said -- without much danger of contradiction -- that unsightly litter is blight in this country the eradication of which requires the expenditure of limited local government resources and presents a myriad of public health and safety concerns."), and then went on to hold that "the ordinances are narrowly tailored to achieve a significant government interest." Id. at 20. Turning to the third and final requirement, the district court determined that the ordinances leave open ample alternative channels of communication because "[t]he alternative channels of communication are numerous and none have been foreclosed by defendants' ordinances." Id. at 21. Accordingly, the district court concluded, "plaintiffs' overbreadth claims against defendants are without merit." Id. at 22.

The district court further held that defendants are entitled to judgment as a matter of law on the issues of whether the ordinances are unconstitutionally vague, id. at 23-25, whether they regulate religious conduct within the meaning of the free exercise clause, id. at 25-26, and whether they are unconstitutional as enacted or applied, id. at 26-28; Krantz, slip op. at 5 (July 30, 1997) (addressing claims against Fort Smith). After the district court entered judgment for defendants, plaintiffs appealed the district court's disposition of the First Amendment issues. Defendants have resisted plaintiffs' appeal on the merits and, as noted above, the City of Dyer has additionally challenged plaintiffs' standing.

Discussion

Plaintiffs' standing to bring claims against the City of Dyer

The City of Dyer argues that plaintiffs lack standing to sue Dyer because no one from the Church has been arrested, has been threatened with arrest, or has refrained from handbilling because of the Dyer ordinance. Under the standard applicable to this type of First Amendment challenge, we hold that plaintiffs have standing to sue the City of Dyer for violating their First Amendment rights. Plaintiffs in the present case allege that, as part of their religion, they believe in, and engage in, the practice of distributing religious literature throughout the world and that they have refrained from leaving literature on unattended parked cars within the City of Dyer because they fear prosecution. Members of the Church have in the past engaged in the precise activity banned by the Dyer ordinance and, although no criminal proceeding is pending in Dyer, plaintiffs have presented evidence that members of the Church fear arrest or the threat of arrest should they engage in such activity in Dyer. See, e.g., Appellants' Appendix at 74, 236, 239. The Dyer ordinance is virtually identical to those of the other defendants and, in fact, has been jointly defended with two of the other ordinances challenged in this litigation. We assume the City of Dyer would prosecute violators of its ordinance, given the opportunity, because it has vigorously defended the ordinance and has never suggested that it would refrain from enforcement. See Virginia v. American Booksellers Ass'n, 484 U.S. 383,393 (1988) ("The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise.").

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of

> the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state court prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Steffel v. Thompson, 415 U.S. 452,462 (1974).

Thus, upon careful review, we hold that plaintiffs have standing to bring this declaratory judgment action to challenge the Dyer ordinance because they have alleged and have sufficiently demonstrated an actual and well-founded fear that the law in question will be enforced against them. See id. (plaintiffs have standing to challenge facial validity of regulation, notwithstanding pre-enforcement nature of lawsuit, where they allege an actual and well-founded fear that the law will be enforced against them); cf. Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193, 198 (5th Cir. 1984) (holding that plaintiff church has standing to bring facial challenge to state statute under free exercise clause based upon "personal stake in the constitutionality of the [state] statute because enforcement of that statute will directly affect the freedom with which its members may fulfill their

professed religious commitment"). We now turn to the merits of this appeal.

Facial challenge on First Amendment overbreadth grounds

Because the material facts relevant to plaintiffs' overbreadth challenge are not in dispute and were sufficiently set forth in the pleadings, it was appropriate for the district court to dispose of that issue on the parties' cross-motions for judgment on the pleadings.[4] We now review de novo the district court's decision to grant judgment on the pleadings for defendants. Franklin High Yield Tax-Free Income Fund v County of Martin, 152 F.3d 736, 738 (8th Cir. 1998) (grant of judgment on the pleadings reviewed de novo). The question before the district court, and now before this court on appeal, is whether the ordinances are unconstitutionally overbroad and thus facially invalid as a matter of law.

Plaintiffs argue that defendants have failed as a matter of law to satisfy their burden of showing that the ordinances are narrowly tailored to serve a significant governmental interest and that they leave open ample alternative channels for communication of the stone information. Plaintiffs suggest that defendants are precluded as a matter of law from relying on litter prevention as the basis for imposing a complete ban on plaintiffs' First Amendment activity. Plaintiffs cite, among other cases, Schneider v. New Jersey, 308 U.S. 147, 162-63

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[4] Plaintiffs filed a motion for declaratory judgment seeking a ruling that the ordinances are, as a matter of law, unconstitutionally overbroad and therefore facially invalid. Slip op. at 3. The district court elected to treat plaintiffs' motion as one for judgment on the pleadings. Id. at 4.

(1939) (Schneider) ("[T]he purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.").

In response, defendants argue that the ordinances are not inconsistent with the Supreme Court's holding in Schneider because the activity/addressed in that case (i.e., handing out leaflets person-to-person to willing passersby) differs significantly from the act of leaving a handbill on an unattended parked vehicle. Defendants further argue that nothing in the ordinances prevents plaintiffs from engaging in the type of handbilling protected under Schneider. Defendants also contend that there is no connection between the physical act of putting a handbill under the windshield wiper of a parked vehicle and the freedom to speak, write, print, or distribute information or ideas, which plaintiffs may do by numerous other means. While defendants concede that public streets and parking lots are public forums, they maintain that they have both the duty and the power to regulate activities affecting the safety and aesthetics of such public areas through direct or indirect regulation. In sum, they contend that the ordinances are narrowly tailored to serve a significant governmental interest and that the ordinances leave open ample alternative channels for communication.

We find it unnecessary to repeat the district court's thorough and instructive summary of the legal landscape in this First Amendment free speech context. Slip op. at 6-9 (discussing among other cases, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)). We also agree with the district court that plaintiffs' overbreadth challenge is governed by the line of cases addressing reasonable time,

place, or manner restrictions. See id. at 15. The three-part test for determining the constitutionality of a time, place, or manner restriction is accurately stated in the district court's opinion. See id. (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (Discovery Network); Ward, 491 U.S. at 798; United States v. Kistner, 68 F.3d 218, 221 (8th Cir. 1995)). While we further agree with the district court's assessment that the ordinances are content-neutral under the first prong of the "reasonable time, place, or manner" test, we part company with the district court at the second stage of the inquiry. For reasons discussed below, we hold as a matter of law that the ordinances are not narrowly tailored to serve a significant governmental interest.

"'[T]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial interest that would be achieved less effectively absent the regulation' and the means chosen does not 'burden substantially more speech than is necessary to further' the city's content-neutral interest." Excalibur Group, Inc. v. City of Minneapolis, 116 F.3d 1216, 1221 (8th Cir. 1997) (Excalibur Group) (quoting Ward, 491 U.S. at 799 (internal quotations omitted)), cert. denied, 118 S. Ct. 855 (1998). In considering whether the narrow tailoring requirement has been met in the present case, we are of the view that the Supreme Court's holding in Schneider is not directly on point, but is highly instructive. In Schneider, 308 U.S. at 162-63, the Supreme Court held that the governmental interest in preventing litter was insufficient to justify an ordinance that would have prohibited individuals from handing out literature to those willing to receive it. The Court in Schneider went on to note that a city has the power to punish individuals who throw leaflets on the ground, as opposed to those who hand leaflets out. Id.; accord Jews for

Jesus, Inc. v. MBTA, 984 F.2d 1319, 1324 (1 Cir. 1993) ("littering is the fault of the litterbug, not the leafletter"). The Supreme Court then concluded in Schneider that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." 308 U.S. at 163.

Not long after Schneider was decided, the Supreme Court considered the constitutionality of an ordinance which made it unlawful in Struthers, Ohio, for any person to distribute to a person within a residence a handbill, circular, or advertisement, by knocking on the door or fining the bell of the residence. Martin v. City of Struthers, 319 U.S. 141 (1943) (Martin). The appellant in Martin, a follower of the Jehovah's Witnesses, was convicted of violating the Struthers ordinance and was ordered to pay a fine after she knocked on the door and summoned the resident of the home for the purpose of distributing religious literature. Id. at 142. The City of Struthers asserted that its ordinance advanced its legitimate governmental interests in protecting citizens from being disturbed in their homes and preventing burglars or other criminals from using such acts as a pretense for criminal activity, Id. at 144. The Supreme Court declared the Struthers ordinance facially invalid because it was not narrowly tailored to serve the city's legitimate goals. The Supreme Court observed: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion." Id. at 145. The Supreme Court observed: "[t]raditionally the American law punishes persons who enter onto property of another after having been warned by the

owner to keep off." Id. at 147. Similarly, the Supreme Court suggested, a regulation could make it unlawful to ring the bell of a householder who has indicated a desire not to be disturbed. Id. at 147-48. The Supreme Court concluded:

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.
>
> . . . .
>
> A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home.

Id. at 146-47 (footnote omitted); accord Rowan v. United

States Post Office Dep't, 397 U.S. 728 (1970) (upholding as constitutional under the First Amendment a federal statute, enforceable by the Postmaster General, which allows householders to notify senders of pandering advertisements that future mailings are not wanted).

In Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995) (Van Bergen), this court considered the constitutionality of a regulation which banned certain automatic pre-recorded telephone solicitations made by "automatic dialing-announcing devices" or "ADADs." Under the facts in Van Bergen, a recipient of an ADAD telephone call had no means to reject the call beforehand or to notify the responsible party afterward that future calls were unwanted. This court carefully distinguished the circumstances of Van Bergen from Martin and held that the regulation was not unconstitutional.

> Telephone calls from a live operator are more disruptive than door-to-door solicitors warned not to disturb, because the recipient must respond once to each caller. When the call is made by a live operator, however, the recipient has the opportunity to tell the operator, at any point in the conversation, that he does not want to hear from the calling person or entity again. An ADAD does not offer the recipient the option of cutting off the calls; it does not offer householders a choice of whether to respond to the speaker or not. The ADAD recipient may hang up as soon as the message starts, but has no opportunity to tell the machine that he does not want it to call again, and may be obliged, against his will, to

> respond over and over to the same unwanted caller.
>
> . . . .
>
> Because ADAD calls intrude upon the privacy and tranquility of the home and the efficiency of the workplace, and *because the recipient has no opportunity to indicate the desire not to receive such calls,* we find that the government has a substantial interest in limiting the use of unsolicited, unconsented-to ADAD calls.

59 F.3d at 1555 (emphasis added) (footnotes omitted).

Thus, although "[w]e will not strike down a time, place, or manner regulation merely because we can envision a less-restrictive or more effective means of furthering the city's content-neutral objectives," Excalibur Group, 116 F.3d at 1221, the "narrowly tailored" analysis, where appropriate, takes into consideration the opportunity for the would-be recipient to provide effective notice that the communications are not wanted. When that factor is considered in the present case, the balance tips in favor of striking the ordinances as overbroad because those individuals who do not want handbills placed on their vehicles can quite easily and effectively provide notice, for example, by placing a sign on the dashboard.

In Bolger v. Youngs Drug Prods., 463 U.S. 60 (1983) (Bolger), the Supreme Court revisited the issue of whether a governmental regulation was narrowly tailored or burdened substantially more speech than necessary to further the

underlying governmental interest. Bolger involved a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. The Supreme Court held that the statute affected commercial speech and, although commercial speech is generally accorded less constitutional protection than non-commercial speech, it nevertheless enjoys "substantial protection." Id. at 64-65, 68. The Supreme Court then observed:

> [W]e have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended. The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." Recipients of objectionable mailings, however, may "'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'" Consequently, the "short, though regular, journey from mail box to trash can ... is an acceptable burden, at least so far as the Constitution is concerned."

Id. at 72 (citations omitted). Addressing the regulation before it, the Supreme Court noted that, although the ban on unsolicited contraceptives advertisements helped to screen such materials from the view of children, this "marshal degree of protection" required the government to screen the prohibited material from everybody's mail, even though such materials are "entirely suitable for adults." Id. at 73. The Supreme Court thus concluded "a restriction of this scope is more extensive than the Constitution permits, for the

government may not 'reduce the adult population ... to reading only what is fit for children.'" Id. (quoting Butler v. Michigan, 352 U.S. 380,383 (1957)). The Supreme Court held that the regulation burdened substantially more speech than necessary to further the underlying governmental interest.

Similarly, in the present case, the ordinances suppress considerably more speech than is necessary to serve the stated governmental purpose of preventing litter. The ordinances prohibit the placement of any handbill on any unattended vehicle, regardless of whether the driver, owner, or an occupant might wish to receive the handbill and notwithstanding the fact that some, if not most, people would not throw on the ground papers left on their cars. While we have no difficulty concluding that the inconvenience of having to dispose of unwanted paper "is an acceptable burden, at least so far as the Constitution is concerned," Bolger, 463 U.S. at 72, that minor inconvenience is not even necessary in the present case because, like the householders in Martin and Rowen, those who do not wish to be left with handbills can quite easily notify distributors of that fact. As the Supreme Court reasoned in Marlin and Schneider, defendants' goal of preventing litter can be accomplished by punishing the handbill distributors who defy such notices, as well as the "litterbugs" who choose to throw papers on the ground. See Martin, 319 U.S. at 147 ("A city can punish those who call at a home in defiance of the previously expressed will of the occupant."); Schneider, 308 U.S. at 162 ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street.").

Nor do we disagree with defendants' assertion that they may, consistent with prevailing constitutional standards, protect legitimate aesthetic and safety interests through indirect regulations that impose some burden on speech. However, to do so, defendants must demonstrate the existence of a "reasonable fit" between their asserted goal and the means that they have selected to accomplish it. Discovery Network, 507 U.S. at 416 ("It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests."). Thus, in Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991), involving a First Amendment free speech and free exercise challenge to a city's zoning ordinance, this court reversed the district court's grant of summary judgment in favor of the defendant city because there was insufficient evidence that the city had studied the issues or found reliable evidence regarding the effect of the regulated activity (in that case, the location of churches in the central business district) upon the governmental interest presumably being harmed (economic revitalization).

In the present case, notwithstanding defendants' evidence that government officials received complaints about handbills left on cars and that the ordinances were enacted for the purpose of preventing litter, defendants have not established a factual basis for concluding that a cause-and-effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities. This flaw in defendants' position provides an alternative basis for reversing the district court's grant of summary judgment for defendants. Id. at 469 ("The City has not provided factual

support for the assumptions that underlie its exclusion of churches, and the alleged secondary effects of churches on commercial activity remain a disputed factual issue."); cf. Excalibur Group, 116 F.3d at 1221 (affirming pant of summary judgment for defendant where the record "indicate[d] that the city had substantial evidence on which to base its conclusions about the secondary effects of adults-only businesses."). Even if we were to assume that a logical connection exists between plaintiffs' handbilling activities and the actual or potential presence of litter on defendants' streets, that correlation does not necessarily mean the ordinances are narrowly tailored to serve the purpose of preventing litter. Although a governmental restriction does not have to be the least restrictive or least intrusive means of regulation, it may not, under well-established constitutional standards, curtail substantially more speech than is necessary to accomplish its purpose, which is precisely what the ordinances do.

Conclusion

We hold that the challenged portions of the ordinances are not narrowly tailored to serve the governmental purpose asserted by defendants. Having therefore determined as a matter of law that the ordinances are facially invalid on overbreadth grounds, we need not address plaintiffs' remaining arguments on appeal concerning their claims of selective enforcement and discriminatory enactment. The judgments of the district court are reversed, and this case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed April 13, 1999]

No. 97-3359WAFS

Appeal from the United States
District Court for the
Western District of Arkansas

ALBERT KRANTZ, et al., Appellants,	)
v.	)
CITY OF FORT SMITH, et al., Appellees.	)

ORDER

Appellants have moved for an award of attorneys' fees and expenses for services rendered on appeal and for a supplemental award of attorneys' fees and expenses. Appellants are hereby awarded a total of $51,525.00 for all attorneys' fees requested and $45.00 for the expenses requested in their supplemental motion. Regarding the $3,471.75 in expenses appellants requested in their original

motion, appellants are directed to file within twenty (20) days of the date of this order an itemization of such expenses.

Each of the four appellees shall pay one-quarter of the amount of the total award.

April 13, 1999

Order Entered at the Direction of the Court:

/s/_____
Michael E. Gars
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

[Filed July 30, 1997]

Civil No. 95-2135/95-2136

ALBERT KRANTZ, RON DECKER, DONALD SWEAT, on behalf of themselves and others similarly situated,
Plaintiffs,

v.

THE CITIES OF ALMA, DYER, FORT SMITH, and VAN BUREN, et al.
Defendants.

MEMORANDUM OPINION AND JUDGMENT

NOW on this 30 day of July, 1997, comes on for consideration a supplemental motion for judgment on the pleadings (document #143) filed by separate defendants, Cities of Alma, Dyer and Van Buren, Arkansas, and a motion for summary judgment (document #150) filed by separate defendant City of Fort Smith, Arkansas, and the Court, being well and sufficiently advised, finds and orders as follows:

1. For purposes of its analysis, the Court hereby adopts and incorporates by reference the Memorandum Opinion and Judgment entered by this Court on November 27, 1996.[1]

2. Defendants Alma, Dyer and Van Buren are seeking judgment on the pleadings with reference to two (2) new claims raised by the plaintiffs' amended complaint. In their amended complaint -- which was filed after defendants made their previous motion for judgment on the pleadings -- plaintiffs contend that the defendants' municipal ordinances violate (a) the Arkansas Constitution and (b) the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1. Defendants now seek judgment on both of these claims. In response, plaintiffs contend that factual issues regarding defendants' enforcement of the municipal ordinances precludes judgment on the pleadings.

3. Defendant Fort Smith is similarly seeking summary judgment on plaintiffs' claims that Fort Smith enacted its municipal ordinances with an intent to discriminate against plaintiffs; that plaintiffs have been selectively prosecuted by Fort Smith; and that Fort Smith's municipal ordinances violate the Arkansas Constitution and the Religious Freedom Restoration Act of 1993. Plaintiffs object to defendant Fort Smith's motion, contending that genuine issues of material fact remain in dispute which preclude summary judgment.

---

[1] The ordinances which are being challenged by plaintiffs are set out word for word in the Court's Memorandum Opinion of that date and for that reason, will not be repeated herein.

Standard of Review

4. The Court has before it motions for judgment on the pleadings as well as a motion for summary judgment.

(a) Motions for judgment on the pleadings are governed by F.R.Civ. P.12(c) and are reviewed under the same standard as a Rule 12(b) (6) motion. *Westcott v.* City *of Omaha,* 901 F.2d 1486, 1488 (8th Cir. 1990) (citations omitted). Thus, in ruling on Rule 12(c) motions, "all well-pleaded matters in the complaint must be accepted by a district court as true and correct." *Lone Star Industries Inc. v. Horman Family Trust,* 960 F.2d 917 (10th Cir. 1992). Motions for judgment on the pleadings should not be granted "unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claim which would entitled them to relief." *United States v. Aceto Agricultural Chemicals Corp.,* 872 F.2d 1373 (8th Cir. 1989). *See also Lone Star,* 960 F.2d at 920, quoting *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims. Thus, it is only in the 'unusual case' where the complaint on its face reveals some insuperable bar to relief that a dismissal . . . is warranted." *Aceto Agricultural Chemicals Corp.,* 872 F.2d at 1376 (citations omitted).

(b) Motions for summary judgment are governed by F.R.Civ.P. 56(c) which provides for the entry of judgment for the moving party when there is no genuine issue as to any material fact and those undisputed facts warrant entry of such. In considering a summary judgment motion, all evidence and inferences must be viewed in the light most favorable to the

nonmoving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The nonmoving party, however, may not rest his response upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex Corp. v.* Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Davis v. Fulton County, Arkansas,* 90 F.3d 1346 .(8th Cir. 1996).

5. The Court will first address the supplemental motion for judgment on the pleadings which was filed by defendants Alma, Dyer and Van Buren and adopted and incorporated by reference by defendant Fort Smith. The motion first seeks judgment on plaintiffs' claim under the Religious Freedom Restoration Act of 1993, which provides in pertinent part:

(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --

> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (1996).

The Court finds that, as of June 25, 1997, plaintiffs' claim has been foreclosed by the United States Supreme Court's decision in *City of Boerne v. P.F. Flores,* 1997 WL 345322 (U.S. Tex. June 25, 1997) in which the Court struck down the Religious Freedom Restoration Act of 1993 as unconstitutional. Accordingly, plaintiffs cannot maintain such a claim; judgment will be entered for defendants and this claim dismissed.

6. The Court also believes that defendants are entitled to judgment on the pleadings on plaintiffs' claim that defendants' ordinances are violative of the Arkansas Constitution. The Court has already determined that defendants' ordinances are not violative of the United States Constitution, see Court's Memorandum Opinion and Judgment, November 27, 1996, and the plaintiffs have failed and neglected to state a claim for relief under the Arkansas Constitution in their amended complaint. Accordingly,. defendants are entitled to judgment on the pleadings on plaintiffs' claim that the ordinances violate the Arkansas Constitution.

7. The Court now turns to defendant Fort Smith's motion for summary judgment. Fort Smith says it is undisputed that the ordinances in question were adopted without discriminatory purpose and have been enforced without discrimination; Fort Smith contends that plaintiffs have offered and can offer no evidence to the contrary. Plaintiffs attempt to controvert both issues by proffering excerpts of the depositions of Donald Ray Sweat; Bill.. Reather; Ricky Sisson; Roy R. Gean, III; Larry Hammond; Ray H. Hodnett; and Wyman R. Wade, Jr.

The Court has reviewed the sworn testimony submitted by plaintiffs and finds the same insufficient to create a submissible issue on Fort Smith's alleged "selective prosecution." To prevail on this claim, plaintiffs must establish that Fort Smith made law enforcement decisions with discriminatory effects and that the decisions were motivated by a discriminatory purpose. *See Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Plaintiffs must establish that similarly situated individuals were not prosecuted for violations. *United States v. Armstrong,* 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

None of the evidence submitted by plaintiffs indicates or supports the inference that Fort Smith's lawmaking or enforcing body enacted or enforced the ordinances in question with a discriminatory purpose or effect. Much of the proffered evidence is simply irrelevant. It does not provide proof on the issue of "selective enforcement but, rather, relates to activities of a city other than Fort Smith or it is based upon supposition..

The Court, therefore, finds that plaintiffs have submitted no evidence creating a genuine issue of material fact regarding defendant Fort Smith's alleged discriminatory enactment of its ordinances or selective prosecution of the plaintiffs, and that defendant Fort Smith's motion for summary judgment should be granted.

IT IS THEREFORE ORDERED AND ADJUDGED that the supplemental motion for judgment on the pleadings (document #143) filed by separate defendants, Cities of Alma, Dyer and Van Buren, Arkansas, and adopted by separate defendant City of Fort Smith, be, and it hereby is, granted;

IT IS FURTHER ORDERED that the motion for summary judgment (document #150) filed by separate defendant City of Fort Smith, Arkansas, be, and it hereby is, granted; and

IT IS FURTHER ORDERED that plaintiffs' complaint be, and it hereby is, dismissed with prejudice.

IT IS SO ORDERED.

/s/_____
JIMM LARRY HENDREN
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

[Filed January 3, 1997]

Civil No. 95-2135/95-2136

ALBERT KRANTZ, RON DECKER, DONALD SWEAT, on behalf of themselves and others similarly situated, Plaintiffs,	)
v.	)
THE CITIES OF ALMA, DYER, FORT SMITH, and VAN BUREN, et al. Defendants.	)

ORDER

NOW on this 3rd day of January, 1997, comes on for consideration a Motion to Adopt by Reference the Supplemental Motion for Judgment on the Pleadings filed by Other Defendants (document #153 filed by separate defendant City of Fort Smith on December 5, 1996, and the Court, being well and sufficiently advised that there is no objection to the motion, finds that the same should be, and hereby, is

granted.

IT IS SO ORDERED.

/s/_____
JIMM LARRY HENDREN
U.S. DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

[Filed November 27, 1996]

Civil No. 95-2135/95-2136

ALBERT KRANTZ, RON DECKER, and DONALD SWEAT, on behalf of themselves and others similarly situated, Plaintiffs,	)
v.	)
THE CITIES OF ALMA, DYER, FORT SMITH, and VAN BUREN, et al. Defendants.	)

JUDGMENT

NOW on this 27 day of November, 1996, in accordance with the Court's Memorandum Opinion entered concurrently herewith, the Court finds and orders that:

(a) plaintiffs' Motion for Declaratory Judgment (document #90) be, and it hereby is, denied;

(b) defendant Van Buren's Motion for Judgment on the Pleadings (document #95) be, and it hereby is, granted;

(c) defendant Van Buren's Motion for Summary Judgment (document #95) be, and it hereby is, granted;

(d) defendant Alma's Motion for Judgment on the Pleadings (document #98) be, and it hereby is, granted;

(e) defendant Alma's Motion for Summary Judgment (document #98) be, and it hereby is, granted;

(f) defendant Dyer's Motion for Judgment on the Pleadings (document #92) be, and hereby is, granted;

(g) defendant Dyer's Motion for Summary Judgment (document #92) be, and it hereby is, granted;

(h) defendant Fort Smith's Motion for Partial Judgment of Dismissal on the Pleadings (document #107) be, and it hereby is granted; and

(i) plaintiffs' complaint against the cities of Van Buren, Dyer and Alma be, and it hereby is, dismissed with prejudice.

IT IS SO ORDERED.

/s/_____
JIMM LARRY HENDREN
U.S. DISTRICT JUDGE

District Court Memorandum Opinion - 11/27/96

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

[Filed November 27, 1996]

Civil No. 95-2135/95-2136

ALBERT KRANTZ, RON DECKER, and DONALD SWEAT, on behalf of themselves and others similarly situated, Plaintiffs,	)
v.	)
THE CITIES OF ALMA, DYER, FORT SMITH, and VAN BUREN, et al. Defendants.	)

MEMORANDUM OPINION

NOW on this 27 day of November, 1996, comes on for consideration and disposition the following:

* plaintiffs' Motion for Declaratory Judgment (document #90) filed on October 18, 1996;

* defendant Van Buren's Motion for Judgment on the Pleadings and Motion for Summary Judgment (document #95) filed on October 18, 1996;

* defendant Alma's Motion for Judgment on the Pleadings and Motion for Summary Judgment (document #98) filed on October 18, 1996;

* defendant Dyer's Motion for Judgment on the Pleadings and Motion for Summary Judgment (document #92) filed on October 18, 1996; and

* defendant Fort Smith's Motion for Partial Judgment of Dismissal on the Pleadings (document #107) filed on October 18, 1996.

After full consideration of the foregoing pleadings and the responses thereto filed by opposing parties, the Court, being well and sufficiently advised, finds and orders as follows:

Background

1. Some information about the background of this case will be helpful although the Court deems it unnecessary to set out complete details for purposes of making the rulings at hand.

The plaintiffs -- whose several claims have previously consolidated into one action by order of the Court -- are members of the Twentieth Century Holiness Tabernacle Church (the "Church") who wish to disseminate religious tracts or handbills in the cities of Alma, Dyer, Van Buren and Fort Smith, Arkansas ("Defendants"). The methods of distribution contemplated by plaintiffs are curtailed by municipal ordinances in each of the four (4) cities.

Plaintiffs contend that the defendants, through enactment and enforcement of their respective ordinances, have violated plaintiffs' constitutionally protected rights of free speech and religion. They seek a permanent injunction enjoining defendants from future enforcement of the ordinances in question and, in addition, plaintiffs seek money damages by reason of past enforcement activities of defendants with respect to the said ordinances.

On May 21, 1996, the Court ruled that plaintiffs could pursue their constitutional claims as a class, with the class being composed of the three following identifiable groups which would be allowed to participate:

* individuals who have been arrested for violation of the ordinances;

* individuals who have been threatened with arrest for violation of the ordinances; and

* individuals who desire to distribute handbills but refrain from doing so because of a reasonable belief that they might be arrested for violation of the ordinances.

Plaintiffs' 42 U.S.C. § 1983 claims were stayed pending resolution of their class action constitutional challenge.

Although there has been no notification of class members as previously required by the Court -- and the Court does not excuse that failure on the part of plaintiffs -- the Court will nevertheless proceed with its consideration of the constitutional issues presented by the pending motions because

it believes them to be ripe and capable of disposition at this time.

2. Plaintiffs' motion for declaratory judgment asks this Court to declare, as a matter of law, that the respective ordinances of Fort Smith, Alma, Dyer and Van Buren are both unconstitutionally overbroad and facially invalid.

The arguments advanced by plaintiffs in support of their request can be summarized as follows:

(a) that plaintiffs' distribution of handbills is conduct and speech fully protected by the First Amendment;

(b) that plaintiffs' distribution of handbills takes place on public streets and public parking lots;

(c) that public streets and the like are public forums for First Amendment analysis;

(d) that defendants' ordinances -- which plaintiffs say are, in fact, restrictions of expressive activity in public forums -are not "narrowly tailored" to achieve legitimate government objectives; they do not leave open ample alternative channels of communication; and they, therefore, are unconstitutional.

3. Defendants have responded to plaintiffs' motion and have also filed their own motions for judgment on the pleadings. They insist that plaintiffs' overbreadth arguments are without merit and they, the defendants, seek dismissal of plaintiffs' constitutional claims as being without merit.

Separate defendants Alma, Dyer and Van Buren have also filed their own motions for summary judgment, contending that their particular ordinances were not enacted for discriminatory purposes and that plaintiffs have not been selectively prosecuted by them. They ask the Court to dismiss, with prejudice, plaintiffs' claim that the ordinances are unconstitutional as applied.

Standard of Review

4. The Court has before it motions for judgment on the pleadings as well as motions for summary judgment and will treat plaintiffs' motion for declaratory relief as one for judgment on the pleadings.

(a) Motions for judgment on the pleadings are governed by F.R.Civ. P.12(c) and are reviewed under the same standard as a Rule 12(b) (6) motion. Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990) (citations omitted). Thus, in ruling on Rule 12(c) motions, "all well-pleaded matters in the complaint must be accepted by a district court as true and correct." Lone Star Industries, Inc. v. Horman Family Trust, 960 F.2d 917 (10th Cir. 1992). Motions for judgment on the pleadings should not be granted "unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claim which would entitled them to relief." United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989). See also Lone Star, 960 F.2d at 920, quoting Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims. Thus, it is only in the 'unusual case' where the complaint on its face

reveals some insuperable bar to relief that a dismissal . . . is warranted." Aceto Agricultural Chemicals Corp., 872 F.2d at 1376 (citations omitted).

(b) Defendants' motions for summary judgment are governed by F.R.Civ. P. 56(c) which provides for the entry of judgment for the moving party when there is no genuine issue as to any material fact and those undisputed facts warrant entry of such. In considering a summary judgment motion, all evidence and inferences must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The non-moving party, however, may not rest his response upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Davis v. Fulton County, Arkansas, 90 F.3d 1346 (8th Cir. 1996).

In order of dispose of the several motions, it will be appropriate for the Court to discuss certain general topics which are fairly raised in all of them.

I. Freedom of Speech

5. A principal concern of plaintiffs is that enforcement of the ordinances in question impermissibly impinges upon their rights of free speech as protected under the United States Constitution. Accordingly, it is necessary to examine the concept of "freedom of speech" as it relates to the situation at hand.

The United States Supreme Court has characterized the freedom of speech as a fundamental personal right and liberty. Schneider v. Irvington, 308 U.S. 147, 161, 60 S.Ct. 146, 84 L.Ed.2d 155 (1939). The freedom of speech "secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state" or by a municipality. Schneider, 308 U.S at 160. Thus, "[i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2916-17, 37 L.Ed.2d 830 (1973).

(a) Overbreadth: Plaintiffs say that the ordinances' "rational relationship with [their] stated purpose of eliminating litter is minimal, there is an inadequate nexus with the stated goal of eliminating litter, and [they] proscribe conduct which is protected under the First Amendment." Plaintiffs' Class Action Allegations, Amended Complaint, ¶ 28. Plaintiffs contend, therefore, that the ordinances are unconstitutionally overbroad. An "overbreadth" challenge is based upon the contention that particular ordinances "are written so broadly that they may inhibit the constitutionally protected speech of [not only those before the Court but also] third parties." Vincent, 466 U.S. at 798. This concept of overbreadth -- sometimes referred to as "facial invalidity" -- has been characterized as "manifestly strong medicine" and is sparingly applied by the courts. Broadrick, 413 U.S. at 613, 93 S.Ct. at 2916. Courts are especially hesitant to utilize the concept when it is invoked with respect to ordinary criminal laws

which may apply to protected conduct. Id.

The overbreadth concept has its source in Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) where the Supreme Court concluded that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge by a party whose own conduct may be unprotected. Id. Thus, in analyzing an overbreadth challenge, the Court is authorized to consider the ordinances' impact not only upon those actually impacted but also upon those whose constitutionally protected speech may be inhibited by the ordinances. This, then, is an exception to the general standing rule "predicated on a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Vincent, 466 U.S. at 799, 104 S.Ct. at 2125. However, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Id. at 801, 104 S.Ct. at 2126.

It should also be noted that, particularly where conduct and not merely speech is involved, "the overbreadth of a statute must not only be real, but substantial as well." Id. at 615, 93 S.Ct. at 2917; see also City Council v. Taxpayers for Vincent, 466 U.S. 789, 799-801, 104 S.Ct. 2118, 2125-26, 80 L.Ed.2d 772 (1984); New York v. Ferber, 458 U.S. 747, 770-71, 102 S.Ct. 3348, 3361-62, 73 L.Ed.2d 1113 (1982). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an over-breath challenge." Vincent, 466 U.S. at 800, 104 S.Ct. at 2126.

To evaluate an overbreadth claim, the Court must determine whether the challenged ordinances feature reasonable time, place or manner restrictions and, to do so, it must apply a three part test. See Pursley v. City of Fayetteville, Arkansas, 820 F.2d 951, 954 (8th Cir. 1987). That test includes: (1) whether the speech is protected speech; (2) if so, in what "forum" it is to be expressed or exercised; and (3) whether, in that forum, there are constitutionally acceptable justifications for limiting what would otherwise be protected speech.

So, the first question here is whether plaintiffs' activity is speech protected by the First Amendment. If so, the next task for this Court is to "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 105. S.Ct. 3439, 3446-47, 87 L.Ed.2d 567 (1985). Finally, in light of what has been determined in the first two inquiries, it must be decided whether the justifications for excluding expressive activity satisfy the relevant constitutional standard. Pursley, 820 at 954.

The Court will, therefore, examine the facts at hand in light of the foregoing.

(1) Protected Speech: Plaintiffs challenge four particular criminal ordinances of the cities of Fort Smith, Van Buren, Alma and Dyer which restrict leafletting or handbilling in certain areas of the respective cities.

Van Buren's Ordinance No. 5-1983, which is substantially similar to and representative of each of the

challenged ordinances, provides in part:

> SECTION 1. It shall be unlawful for any person to throw or deposit any commercial or non-commercial handbill or other hand distributed advertisement in or upon any sidewalk, highway, street, boulevard, alley or other public way or in or upon any public park, square, public plaza, public recreation area or public building within the City, provided however, that it shall not be unlawful on any sidewalk, street, or any other public place in the City for any person to hand out or distribute any commercial or non-commercial handbill or other hand distributed advertisement to any person willing to accept it.
>
> SECTION 2. It shall be unlawful for any person to drop, deposit, or distribute any commercial or noncommercial handbill or other hand distributed advertisement, in or upon any private premises within the City, except by handling and transmitting any such handbill or advertisement directly to the owner, occupant, or other person then present in or upon such private premises or by so placing or depositing said advertisement so as to secure and prevent same from being blown or carried about by the elements from any said premises to other public or private places.
>
> This Section does not apply to those

> commercial or non-commercial handbills or other hand distributed advertisements which the owner or occupant of the premises has given permission to be delivered to the owner or occupant of the premises or for which the owner or occupant of the premises has other contract for, solicited for, or otherwise authorized the placing or depositing of said handbills or advertisement upon the premises. Nor does it apply to newspapers. Newspapers being defined for the purpose of this Ordinance as: "A publication usually in sheet form intended for general circulation and published regularly as short intervals, containing intelligence of current events and news of general interest."
>
> SECTION 3. It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill or other hand distributed advertisement upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, alley within the City of Van Buren, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.[1]

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[1] Alma Ordinance No. 8-3 is identical to the Van Buren Ordinance except for the substitution of "Alma" for Van Buren;

While the Court believes there is little doubt that handbilling or leafletting is an "expressive activity involving 'speech' protected by the First Amendment," United States v. Grace, 461 U.S. 171, 176, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983), the Supreme Court has recognized that the right to handbill extends only the right to distribute literature to those "willing to receive it." Schneider v. State, 308 U.S. 147, 162 60 S.Ct. 146, 84 L.Ed. 155 (1939). The First Amendment does not extend the right to force handbills on unwilling recipients on public property nor does it extend a right to intrude uninvited onto private property. Id.

The Court is not altogether comfortable with the notion that these ordinances actually regulate handbilling -- and, therefore, speech or expression. To the contrary, the Court believes these ordinances regulate the conduct of littering -- the physical act of throwing down or depositing a piece of paper on public and private property. Nevertheless, since the Court believes that the effect of the ordinances -- at least to some limited extent -- can be construed as a limitation on handbilling activities, and since handbilling is an expressive activity protected by the First Amendment, the Court is of the view that the ordinances have some impact on expressive conduct. In light of its belief that defendants' ordinances may touch upon protected speech, the Court will proceed to consider the nature of the regulated forum.

Dyer Ordinance No. 83-4 is substantially similar, substituting "Dyer" for Van Buren and omitting the newspaper provision in Section 2; and § 14-51 of the Fort Smith Code of Ordinances is substantially similar, omitting the newspaper provision in Section 2.

(2) Nature of Forum: The Court recognizes that "the standards by which limitations on speech must be evaluated 'differ depending on the character of the property (where or on which it is sought to be expressed) at issue.'" Frisby v. Schultz, 487 U.S. 474,-479, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988).

If the forum is a "public" one, the state's ability to limit expressive activity is "sharply circumscribed." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

The plain language of the ordinances purports to regulate public sidewalks, highways, streets, boulevards, alleys, other public ways, public parks, squares, plazas, public recreation areas and public buildings within the City. They also purport to place restrictions with respect to private premises within the City as well as with respect to all vehicles -- private and public -- located on public streets, highways, sidewalks, roads, or alleys within the city limits.

Several Supreme Court cases have held streets and the like to be traditional public forums:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of a regulation, be abridged or denied.

Hague v. Committee for Indus. Organization, 307 U.S. 496, 515-16, 59 S.Ct. 954, 964, 83 L.Ed.2d 1423 (1939). "[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot be constitutionally denied broadly and absolutely." Hudgens v. NLRB, 424 U.S. 507, 515, 96 S.Ct. 1029, 1034, 47 L.Ed.2d 196 (1976). "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum. Frisby v. Schultz, 487 U.S. 474, 480, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988). "'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" United States v. Grace, 461 U.S. at 177, 103 S.Ct. at 1707.

In light of the clear wording of the ordinances and the teachings of Supreme Court precedents, the Court concludes that defendants' ordinances affect conduct which may encompass the exercise of First Amendment rights in public forums -- sidewalks, highways, streets, boulevards, alleys, parks, squares, plazas, public recreation areas, public buildings and other public areas.

The foregoing conclusion does not, however, serve to

invalidate the ordinances or to end the inquiry.

First, it must be noted that the government is permitted -- even in public forums -- to impose reasonable time, place or manner restrictions on expressive activities, Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 1516, 123 L.Ed.2d 99 (1993). "Even protected speech is not equally permissible in all places and at all times." Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 799, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Accordingly, further inquiry is in order with respect to the public forum matter.

Second, it is noted that the ordinances also purport to curtail conduct which could affect expressive activity on private premises and on privately owned vehicles parked in public places. Accordingly, further inquiry is in order with respect to the private forum matter.

The fact is that, under settled interpretations of the federal constitution, individuals do not enjoy the same constitutionally protected freedom of expression on private premises as they traditionally do enjoy in public forums. Accordingly, the government is afforded more leeway in regulating speech by third parties on privately owned property. Schneider, 308 U.S. at 162-63.

Since the ordinances in question appear to regulate both public and private forums, the Court believes it appropriate to conduct its analysis with reference to the constitutional standard applicable with respect to public forums. This is appropriate, in the Court's view, because if the ordinances are found to be constitutional under the more

stringent public forum analysis, it logically follows that they would also be found to be constitutional under the less rigorous standard appropriate for private forum analysis.

(3) Restrictions -- Reasonable Time, Place or Manner: The Court now considers whether defendants' justifications for excluding the expressive activity and the means used by them to carry out their goal are constitutionally permissible.

As previously noted, written expression in public forums is subject to reasonable time, place or manner restrictions. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 1516, 123 L.Ed.2d 99 (1993); Ward v. Rock Against Racism, 491 U.S. 781, 798, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989); United States v. Kistner, 68 F.3d 218, 221 (8th Cir. 1995). Restrictions, however, must be (a) content neutral, (b) narrowly tailored to serve a significant government interest, and (c) leave open ample alternative channels of communication. Id.

(i) Content Neutrality: The Constitution does not permit government to regulate speech because it disagrees with its content or message. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296, 104 S.Ct. 3065, 3070, 82 L.Ed.2d 221 (1984). A regulation is content neutral if the government can justify the restriction without reference to the content of the regulated activity. Clark v. Community for Creative Non-Violence, 468 U.S. at 296, 104 S.Ct. at 3070. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48,

106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Here, defendants argue, and plaintiffs concede, that the ordinances are content neutral.

The Court agrees that none of the ordinances reference the content or message of any handbill or advertisement regulated. Additionally, there is no evidence that defendants have "adopted a regulation of speech because of disagreement with the message it conveys." Ward, 491 U.S. at 791. The ordinances -- outlining criminal and prohibited conduct in plain language -- apply evenhandedly to "any person" -- and not just to plaintiffs or to those holding similar beliefs. Thus, the fact that the ordinances may have an incidental effect on some speakers or messages -- but not others -- does not render the ordinances invalid on that score.

(ii) Narrowly Tailored -- Significant Governmental Interest: It is well-established that the "government may regulate in the area only with narrow specificity." NAACP v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963) (citation omitted). Thus, even content neutral restrictions on expressive activity must be narrowly tailored to serve a significant government interest. Ward, 491 U.S. at 789, 109 S.Ct. at 2753.

The requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985). Although defendants are not required to show that their ordinances are the "least-restrictive" means of accomplishing their objectives, Ward, 491 U.S. at 798, 109 S.Ct. at 2357, defendants "may not

regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Renton, 475 U.S. at 51-52, 106 S.Ct. at 931. In other words, the regulation must not "burden substantially more speech than is necessary to further the government's legitimate interests":

> So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted." (citations omitted).

Ward, 491 U.S. at 799-800.

The Court believes that the ordinances in question are narrowly tailored to reach the defendants' aesthetic and safety interests and that they do not "foreclose an entire medium of expression." City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038, 2045, 129 L.Ed.2d 36 (1994).

The Court wishes to emphasize that which it believes to be both important -- and obvious -- that these ordinances neither ban nor abolish traditional handbilling or leafletting.

With the ordinances in place and being enforced, such activities may continue unfettered in all public places *provided* that the distribution is personal -- i.e. from "any person" with a handbill to "any person willing to receive it." The Court believes that the conduct clearly prohibited by the ordinances is that of throwing down or depositing handbills in the absence of any specifically intended receiver or recipient -- i.e., littering.

Accordingly, the Court believes that the dissemination of expressive materials in "quintessential public forums" can clearly continue in the cities in question unaffected by defendants' ordinances.

It also follows, the Court believes, that handbilling on private property is clearly still permissible if conducted with permission of the owner of that property or otherwise in a manner which will not legally amount to littering of the property under the criteria discussed above.

Closely intertwined in this analysis is the significance of the government's interest which "must be assessed in light of the characteristic nature and function of the particular forum involved." Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 651, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

The principle justification for defendants' ordinances is said to be the prevention and reduction of litter on all property, both public and private. While the Supreme Court has held that the prevention of litter is not a sufficiently significant government interest to warrant a "prophylactic prohibition" or ban of the distribution of handbills, that Court

has indicated that a "State may legitimately exercise its police powers to advance aesthetic values." Vincent, 466 U.S. at 808, 805. (citations omitted).

This Court believes that the animus of these ordinances is the control of litter and that the prevention and reduction of litter is a significant aesthetic, environmental and safety interest of local governments. It can certainly be said -- without much danger of contradiction -- that unsightly litter is blight in this country the eradication of which requires the expenditure of limited local government resources and presents a myriad of public health and safety concerns.

The Court believes that defendants have carefully tailored the ordinances to advance the municipalities' interest in controlling litter by limiting only the activities which directly tend to promote an increase in litter -- the dissemination of written material on public property without recipients or receivers and the dissemination of written material on private property when the material cannot be secured from "being blown or carried about by the elements."

The Court further believes there is no constitutional impediment to "the punishment of those who actually throw papers on the streets." Vincent, 466 U.S. at 808-09. As stated by the Court in Vincent, the only right recognized by the Supreme Court is the right to tender "written material to a passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground." Vincent, 466 U.S. at 809-10. There is no constitutional right to litter -- even in the guise of free speech -- and no impediment to the punishment of persons engaging in the act of littering. Again,

the Court expresses its belief that these ordinances do not affect the recognized rights of citizens to tender "written material to a passerby." The ordinances purport to prevent citizens from throwing papers on the streets or from placing papers in areas which will increase the amount of litter in our society. The Court thus finds that the ordinances are narrowly tailored to achieve a significant government interest.

(iii) Alternative Channels of Communication:

The final hurdle of a reasonable time, place or manner restriction is that alternative channels of communication must be available. While "the First Amendment does not guarantee the right to employ every conceivable method of communication in all times and all places, . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." Vincent, 466 U.S. at 812, 104 S.Ct. at 2132. Thus, the ordinances must leave open ample alternative means to communicate the information. Ward, 491 U.S. at 802, 109 S.Ct. at 2760.

As stated above, traditional handbilling or leafletting -- the distribution of written expression by one person to another -- has not been affected by the ordinances on either public or private property. Handbilling in this sense apparently continues unimpeded as it appears that handbills may be directly distributed to any person willing to accept them in any of defendant cities.

It also appears that the ordinances in question do not impair handbilling on private property, with permission, in any of the defendant cities. In fact, it appears that the ordinances in question even permit handbilling on private

property -- without permission -- when the handbill can be secured from being blown away. It appears, therefore, that in each of defendant cities handbilling as a channel of communication for plaintiffs' message, while circumscribed, has been preserved.

The Court notes that numerous other avenues for the dissemination of expressive ideas remain unaffected by defendants' ordinances. The ordinances do not prevent plaintiffs from mailing directly to residents; from transmitting messages through use of the telephone lines, including electronic and computer media; from utilizing broadcast media and newspapers; et cetera. The alternative channels of communication are numerous and none have been foreclosed by defendants' ordinances.

(4) No Significantly Difference Impact: Finally, in order to sustain an overbreadth challenge, plaintiffs "must identify a significant difference" between their own claim that the ordinances are unconstitutional as applied and their claim that the ordinances are invalid on overbreadth grounds. Van Bergen, 59 F.3d at 1549. Plaintiffs have simply failed and neglected to identify any significant difference between the claim that defendants' ordinances are unconstitutional as applied and unconstitutional on their face.

Because the challenged ordinances regulate conduct -- handbilling or leafletting -- any overbreadth which might be found to exist must be "substantial." Broadrick, 413 U.S. at 615. This means that there must be a "realistic danger that the statute itself will significantly compromise First Amendment protection of parties not before the Court." Vincent, 466 U.S. at 800. The Court finds that there is no realistic danger that

the ordinances in question will compromise the First Amendment rights of any party, whether presently before the Court or otherwise. The ordinances regulate litter -- an unsightly, untidy and offensive criminal activity -- and no citizen maintains a constitutional right to engage in littering even if the paper strewn about contains a message which is otherwise expressive and protected by the First Amendment.

In summary, the Court finds that the challenged ordinances meet the requirements of reasonable time, place or manner restrictions of speech protected by the First Amendment. The defendants are advancing a substantial interest in aesthetics, health and safety which is justified without reference to the content of the regulated speech; the ordinances are narrowly tailored to advance this interest and leave open ample alternative channels of communication.

Accordingly, the Court finds that plaintiffs' overbreadth claims against defendants are without merit. The Court will thus grant defendants' motions for judgment on the pleadings on the overbreadth claim and deny plaintiffs' motion for declaratory judgment on their overbreadth claim.

(b) Vagueness: Plaintiffs also challenge the relevant ordinances as unconstitutionally "vague."

The Supreme Court has determined that an ordinance is not unconstitutionally vague if it is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." United States Civil Service Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 579, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

The vagueness doctrine requires that an ordinance satisfy three requirements: (a) the ordinance must give "fair notice of the conduct prohibited; (b) the ordinance must "provide sufficient guidance to officials so that 'arbitrary and discriminatory enforcement' is avoided;" and (c) the ordinance "must be sufficiently clear so that the exercise of constitutionally protected rights is not restrained." Planned Parenthood of Minn. v. Minnesota, 910 F.2d 479, 482 (8th Cir. 1990), quoting Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); see also Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The burden is on the challenger to "'demonstrate that the law is impermissibly vague in all of its applications' . . . and that the statute could never be applied in a valid manner." Planned Parenthood, 910 F.2d at 482, quoting Village of Hoffman Estates v. Flipside, Hoffman Estates,Inc., 455 U.S. 489, 497. 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

(1) In Grayned, the Court stated that a vague law fails to provide citizens reasonable notice of what the law prohibits and allows, and thus will "trap the innocent by not providing fair warning." Grayned, 408 U.S. at 108, 92 S.Ct. at 2298. The defendants' ordinances cannot be characterized as "traps" for the unwary. The ordinances are specific in their prohibitions, delineating permissible handbilling from impermissible littering and designating where such activities are allowed and where they are curtailed. The Court concludes that the ordinances provide clear, fair warning of criminal conduct.

(2) The second concern is that a vague law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective

basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09, 92 S.Ct. at 2298-99. This analysis originated in licensing schemes and has limited application outside that context. In this case the Court believes that the defendant's criminal ordinances do not vest any law enforcement personnel with discretionary power.

(3) The final concern is that "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it chills First Amendment activity by causing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Id. at 109, 92 S.Ct. at 2299. Although First Amendment freedoms are implicated here, there is no risk of chilling protected activity because protected activity is permitted and impermissible unprotected conduct is clearly delineated in plain language. The ordinances are not vague and the Court finds that they have only a tangential effect on plaintiffs' constitutionally protected rights. Accordingly, the Court finds plaintiffs' claims that defendants' ordinances are vague to be without merit. The Court will therefore grant defendants' motions for judgment on the pleadings on plaintiffs' vagueness claim and deny plaintiffs' motion for declaratory judgment on their vagueness claim.

(c) Freedom of Religion -- First Amendment: Plaintiffs further contend that distribution of their literature is an integral part of their religious practice; that the ordinances impermissibly interfere with the distribution of literature; and therefore, the ordinances interfere with plaintiffs' free exercise of religion.

The Court first observes that "a neutral law of general

applicability that incidentally impinges on religious practice will not be subject to attack under the free exercise clause." Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991), citing Employment Div., Dept. of Human Servs. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). To prevail on this claim, therefore, plaintiffs must establish that the government is attempting to regulate religious belief or religious-based conduct, or that the First Amendment is being violated in conjunction with other constitutional protections. Id.

The Court finds that these ordinances have no significant impact on religious belief and should not be construed as directly regulating religious-based conduct. The ordinances are general criminal laws that apply to any attempt to litter by throwing down handbills on public and private property. There is absolutely no evidence that the defendants have an anti-religious agenda or purpose in enforcing the ordinances. Absent evidence of the defendants' intent to regulate religious worship, these ordinances are properly viewed as neutral laws of general applicability and permissible under the teachings of Smith and Cornerstone.

Accordingly, judgment on the pleadings will be granted for defendants on plaintiffs' claims that the ordinances infringe upon plaintiff's constitutionally protected right to free exercise of religion; plaintiffs' motion for declaratory judgment on this claim will be denied.

(d) Unconstitutional Application Argument: The motions for summary judgment filed by defendants Van Buren, Alma, and Dyer also seek judgment on plaintiffs' challenge alleging unconstitutional application of the

ordinances. The City of Fort Smith has not filed a motion for summary judgment on plaintiffs' claim that the ordinances are unconstitutionally applied and thus this ruling neither reaches nor affects that particular claim maintained by plaintiffs against the city of Fort Smith.

Plaintiffs allege that the ordinances were enacted with specific intent to stop plaintiffs' dissemination of religious literature. A discriminatory purpose in the enactment of an ordinance "implies that the decisionmaker . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." United States v. Clary, 34 F.3d 709, 712 (8th Cir. 1994), cert. denied, 115 S.Ct. 1172, 130 L.Ed.2d 1126 (1995). "Discriminatory purpose thus implies even more than an awareness of consequences." United States v. Johnson, 40 F.3d 436 (D.C. Cir. 1994), cert. denied, 115 S.Ct. 1412, 131 L.Ed.2d 297 (1995) .

The Court believes that the ordinances are neutral on their face as applicable to all persons and that their single purpose is the prevention of additional litter on all property, both public and private. Furthermore, the Court finds that plaintiffs have produced no evidence from which a finder of fact could reasonably conclude that the defendants engaged in intentional discrimination against plaintiffs when enacting these ordinances. Once defendants filed their motions for summary judgment, the burden was upon plaintiffs to go outside the pleadings and to meet proof with proof, illustrating that a genuine issue remained for trial. The Court finds that plaintiffs have failed to sustain this burden.

(e) Selective Prosecution Argument: Plaintiffs

further contend that they have been selectively prosecuted for violation of the ordinances. In order to prove selective prosecution or selective enforcement of a law, it must be shown that the enforcement decision had a discriminatory effect and it was motivated by a discriminatory purpose. Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); United States v. Brown, 9 F.3d 1374 (8th Cir. 1993), cert. denied, 114 S.Ct. 1568, 128 L.Ed.2d 213 (1994). So long as the prosecutor has probable cause to believe that the accused committed an offense defined under the law, the decision whether or not to prosecute rests entirely in his discretion. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 1477, 55 L.Ed.2d 511 (1978).

Again, the Court finds that plaintiffs have failed to satisfy the burden imposed. There is no evidence in the record from which a fact finder could conclude that any enforcement decision on behalf of the defendants had a discriminatory effect on the plaintiffs or that any enforcement decision was motivated by a discriminatory purpose. Absent such evidence, the Court is left with no alternative but to grant defendants' motions and dismiss these claims with prejudice.

Conclusion

It follows, from what has been said and for the reasons set forth hereinabove, that:

(a) plaintiffs' Motion for Declaratory Judgment (document #90) should be, and it hereby is, denied;

(b) defendant Van Buren's Motion for Judgment on the Pleadings (document #95) should be, and it hereby is,

granted;

(c) defendant Van Buren's Motion for Summary Judgment (document #95) should be, and it hereby is, granted;

(d) defendant Alma's Motion for Judgment on the Pleadings (document #98) be, and it hereby is, granted;

(e) defendant Alma's Motion for Summary Judgment (document #98) should be, and it hereby is, granted;

(f) defendant Dyer's Motion for Judgment on the Pleadings (document #92) should be, and hereby is, granted;

(g) defendant Dyer's Motion for Summary Judgment (document #92) be, and it hereby is, granted;

(h) defendant Fort Smith's Motion for Partial Judgment of Dismissal on the Pleadings (document #107) should be, and it hereby is granted; and

(i) plaintiffs' complaint against the cities of Van Buren, Dyer and Alma be, and it hereby is, dismissed with prejudice.

IT IS SO ORDERED.

/s/_____
JIMM LARRY HENDREN
U.S. DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97- 3359WAFS

ALBERT KRANTZ, et al., Appellants,	)
v.	)
CITY OF FORT SMITH, ARKANSAS, et al., Appellees.	)

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

January 29, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3359 WAFS

ALBERT KRANTZ, RON DECKER, DON SWEAT, on behalf of themselves and others similarly situated, Plaintiffs,	)
v.	)
CITIES OF ALMA, DYER, FORT SMITH AND VAN BUREN, et al., Defendants.	)

MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES FOR SERVICES RENDERED ON APPEAL

Appellants Albert Krantz, Ron Decker, and Don Sweat, on behalf of themselves and others similarly situated, move for an award of attorneys' fees and expenses for legal services rendered on this appeal. This motion is made pursuant to 42 U.S.C. § 1988, and pursuant to Eighth Circuit Rule 47C, directing that applications for attorneys' fees for legal services rendered on appeal be made in the Court of Appeals within fourteen days after the entry of this Court's judgment. Judgment was entered on this appeal on November 30, 1998.

In support of this motion, appellants rely upon the attached Affidavit of Eric M. Lieberman, the attached Declaration of Don Sweat, the accompnying memorandum of points and authorities, and the decision rendered by this Court in this case on November 30, 1998. By any standard, appellants are the prevailing party on this appeal, and are entitled to their attorneys' fees under 42 U.S.C. § 1988.

The amount of attorneys' fees sought by this motion is based upon the number of hours devoted to the appeal by the attorneys multiplied by their usual and prevailing billing rates. In addition, as established by the case law, appellants seek compensation for the time involved in making this fee application. As set forth in the Lieberman affidavit, solely to avoid any conceivable or arguable need for a remand and hearing on the amount of hours devoted to the case, appellants propose to reduce the legal fee award sought by ten percent (10%). Thus, while the fee award would be $125,385.00 if based exclusively on the amount of hours and the prevailing hourly rate, appellants propose a fee award in the mount of $112,846.50. Appellants also seek expense of $3,471.75. If, however, the Court decides that it is necessary to remand for a determination of the amount of the award, appellants reserve the right to seek the full amount of fees, without the ten percent (10%) reduction. The amounts sought do not include the $614.30 sought by appellants' separately filed Bill of Costs for the expense incurred of duplicating the briefs and appendix on the appeal.

Appellants strongly request that this Court determine this fee application by itself now, rather than remand the application to the district court. The application is limited to legal fees for the appeal alone and therefore this Court is in

the best position to judge the merits of the fee request. Moreover, remand would only serve to delay determination and implementation of a fee award, especially since there remain additional matters for the district court to determine, perhaps by trial, on remand. Appellants' counsel already has undertaken substantial work on this appeal for which compensation is due under section 1988, and it would be unjust to delay determination and payment of such fees indefinitely. Finally, determination by this Court now of the amount of the fee award for this appeal would preclude any possible subsequent appellate practice should one party or the other dispute a fee award by the district court. Thus, judicial economy strongly supports such action by this Court on this motion.

The fee award is based upon the following calculations:

Attorney	Number of Hours	Rate	Fee
Eric M. Lieberman	134.50	$350	$ 47,075.00
Andrew J. Fields	263.00	$225	59,175.00
Scott T. Johnson[1]	191.35	$100	19,135.00
	Total	Fees	$125,385.0
	Less	10%	($12,538.50)
	Fees	Sought	$112,846.50
	Expenses		$3,471.75
TOTAL AWARD	SOUGHT		$116,318.25

WHEREFORE, appellants request that this motion be granted and that the Court award appellants the sum of $116,318.25 in attorneys' fees and expenses for services rendered on this appeal, against all appellees, jointly and severally.

Dated: December 11, 1998

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[1] It should be noted that Mr. Johnson was not a licensed attorney during his work on this appeal. He was admitted to the New York State Bar on April 20, 1998.

Respectfully submitted,

/s/_____

Eric M. Lieberman
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Attorney for Plaintiffs/Appellants

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

[Filed August 28, 1997]

Nos. 95-2135/2136

ALBERT KRANTZ, RON DECKER, DON SWEAT, on behalf of themselves and others similarly situated, Plaintiffs,	)
v.	)
CITIES OF ALMA, DYER, FORT SMITH AND VAN BUREN, et al., Defendants.	)

NOTICE OF APPEAL

Come now Plaintiffs and file this Notice of Appeal in the above-styled cases from this Court's order of November 27, 1996, granting summary judgment to Defendants, which is now a final appealable order; and the Court's order of July 30, 1997, granting judgment for Defendants.

Respectfully submitted this 27th day of August, 1997.

/s/_____
Susan G. James
Counsel for Plaintiffs

Address of Counsel:

Law Office of
Susan G. James & Associates
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Montgomery, AL 36104
334/269-3330

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing was served upon Stanley A. Leasure, Daily, West, Core, Cofman & Cofield, P.O. Box 1446, Fort Smith, AR 72902; and J. Denham, P.O. Box 38, North Little Rock, AR 72115, by first-class mail, postage prepaid, this 27th day of August, 1997.

/s/_____
Susan G. James
Of Counsel

APPENDIX I

ARTICLE III. OFFENSES INVOLVING PUBLIC PEACE AND ORDER

DIVISION 1. GENERALLY

Sec. 14.51. Distribution of handbills and other hand-distributed advertisements.

(a) It shall be unlawful for any person to throw or deposit any commercial or noncommercial handbill or other hand-distributed advertisement in or upon any sidewalk, highway, street, boulevard, alley or other public way or in or upon any public park, square, public plaza, public recreational area or public building within the city, provided however, that it shall not be unlawful on any sidewalk, street, or any other public place in the city for any person to hand out or distribute any commercial or noncommercial handbill or other hand distributed advertisement to any person willing to accept it.

(b) It shall be unlawful for any person to drop, deposit, or distribute any commercial or noncommercial handbill or other hand-distributed advertisement, in or upon any private premises within the city, except by handing and transmitting any such handbill or advertisement directly to the owner, occupant or other person then present in or upon such private premises, or by so placing or depositing said handbill or advertisement so as to secure and prevent same from being blown or carried about by the elements from any such premises to other public or private places. This subsection

does not apply to those commercial or noncommercial handbills or other hand-distributed advertisements which the owner or occupant of the premises or for which the owner or occupant of the premises has otherwise contracted for, solicited for, or otherwise authorized the placing or depositing of such handbills or advertisements upon the premises.

(c) It shall be unlawful for any person to place or deposit any commercial or noncommercial handbill or other hand distributed advertisements upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, or alley within the city, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefor, any handbill to any occupant of the vehicle that is willing to accept it.

Supreme Court, U.S.
FILED
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Nos. 98-1753, 98-1754

IN THE

Supreme Court of the United States

CITY OF FORT SMITH,

Petitioner,

-and-

CITIES OF ALMA, DYER and VAN BUREN,

Petitioners,

v.

ALBERT KRANTZ, RON DECKER and DON SWEAT,
On Behalf Of Themselves and All Others Similarly Situated,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

The questions presented in the Petitions for Writ of Certiorari submitted in this matter are not appropriate for review by this Court.[1/] The two Petitions contend that the Court of Appeals for the Eighth Circuit committed mere error in applying otherwise established principles of law in holding (1) that the anti-handbilling ordinances of the four petitioner municipalities violate the First Amendment to the Constitution, (2) that respondents were the prevailing parties in the action and therefore are entitled to attorneys' fees and expenses under 42 U.S.C. § 1988, and (3) that respondents had standing to challenge the ordinance of Dyer, Arkansas. The petitioners identify no conflict of authorities, either among circuits or with precedent of this Court, and they present no other "compelling reasons", Supreme Court Rule 10, for review by this Court. Consequently, certiorari should be denied.

STATEMENT OF THE CASE

The Facts Presented Below

The petitioners here are four neighboring Arkansas municipalities, each of which enacted a virtually identical ordinance outlawing the practice of placing handbills under the windshield wipers of cars parked on public streets.[2/]

[1/] Petitioners Cities of Alma, Dyer, and Van Buren, Arkansas jointly filed a Petition for Writ of Certiorari. Petitioner Fort Smith, Arkansas filed a separate Petition for Writ of Certiorari.

[2/] The ordinances of the Cities of Alma, Dyer, and Van Buren are set forth at pages 83a-91a of the Appendix

These same ordinances explicitly permit the distribution of handbills on private property, so long as the handbills are secured from being blown away (*i.e.* by placing them under the windshield wipers of cars).

Respondents challenged the four municipal ordinances in the United States District Court for the Western District of Arkansas, seeking declaratory and monetary relief on the grounds that the ordinances were unconstitutional on their face as well as applied and that they were enacted for a discriminatory purpose. After the district court rejected plaintiffs' motion for a judgment on the pleadings, and granted the municipalities' motions for summary judgment, plaintiffs appealed to the Eighth Circuit Court of Appeals. That court held that the ordinances were facially unconstitutional in that they suppressed significantly more speech than was necessary to achieve their purpose. Moreover, the court of appeals held that the municipalities failed to meet their burden to establish a connection between handbilling in the communities and "litter that impacts the health, safety, or aesthetic well being of the defendant cities." (19a-20a) Having found for the respondents on these grounds, the court of appeals did not address the

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to the Petition for Writ of Certiorari of Alma, Dyer, and Van Buren. Hereafter, unless designated otherwise, references to the appendix are to the appendix to the petition of these three municipalities and are made in the form "__a". The ordinance of the City of Fort Smith is set forth at page 71a-73a of the Appendix to the Petition for Writ of Certiorari of the City of Fort Smith. Designations to this appendix are made in the form, "Ft. Smith __a".

respondents' claims of discriminatory enactment and selective enforcement. (20a)

The action was initiated *pro se* in June 1995 by 206 individual members of the Twentieth Century Holiness Tabernacle Church,[3/] nearly fifty of whom had been arrested for distributing Christian literature in three of the four defendant municipalities. After successive amendments to the complaint, the district court certified the case to proceed as a class action. The named respondents here are the representatives of three separate sub-classes certified by the district court, which include those individuals who variously (a) had been arrested under the ordinances, (b) had been threatened with arrest under the ordinances, and (c) feared arrest under the ordinances.

In their efforts to "preach the gospel to every living person on the earth", Alamo Church associates engage in a practice they call "tracting", in which Alamo Church associates distribute Christian literature by placing it under the windshield wipers of parked cars. As a consequence of their practice of tracting, "[m]any people have gotten saved through literature left on vehicles or in establishments that wouldn't have heard the gospel if [the church associate] had just waited to see that person." As Don Sweat, one of the class representatives in this action, explained in his deposition, it was only after he had received a handful of Alamo Church tracts that he was able to go home and read

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[3/] This congregation has existed under several different names including the Gloryland Christian Church, Holiness Tabernacle Church, The Tony and Susan Alamo Christian Foundation, and Holy Alamo Christian Church.

them, "And that's what led me to come into the Church, hearing the gospel, and in turn accepting Christ as my savior and completely turning my life around. And I believe that if it hadn't . . . been for that, I'd have been dead a long time ago, the way my life was going." As another Alamo Church associate explained, "many people do read [the Christian literature], . . . we feel compelled to continue ministering to these people."

The Fort Smith ordinance, passed in 1981, and the Van Buren, Alma, and Dyer ordinances, passed in close succession in 1983, were enacted in response to the Alamo Church congregations' efforts to distribute literature in those communities, and were drafted in a manner that specifically targeted the congregants' practice of distributing gospel literature by placing it under the windshield wipers of parked cars. Thus, one Alamo Church associate explained that the handbill ordinances were "targeted directly at" the Tony and Susan Alamo Foundation, explaining that the ordinances were passed "after they had been to distribute literature out on the streets, on cars, or to people." Likewise, Roy Gean, III, an attorney who represented many of the individuals charged with violation of the ordinances, explained in his deposition that Fort Smith and the other municipalities, in passing the handbill ordinances, were, "limiting the distribution of this literature printed by the Alamo people." One newspaper article, printed on June 23, 1983 in the *Crawford County Bulletin* described the passage of the Dyer handbill ordinance as follows:

> The Dyer city council has passed an anti-handbill ordinance similar to those on the books in other Crawford County cities. The new ordinance forbids the distribution of

> unwanted handbills and calls for a maximum $500 fine for each violation, double the sum for each repetition. . . . Dyer is the headquarters of the Susan and Tony Alamo Christian Foundation whose members have frequently leafleted in the area to tell the public about the foundation's work. . . . Towns in Crawford County have passed strong anti-ordinance (sic) measures following complaints from residents that their homes and automobiles have been littered with Alamo handbills.

In his deposition testimony, John Ballantine, Mayor of Alma, admitted that the anti-handbill ordinance was passed in response to the distribution of literature by the Alamo Church associates and Mayor Fayette Peevey of Dyer equivocated when asked whether the handbill ordinance was enacted in response to the Alamo Church associates.

As with their enactment, the enforcement of the anti-handbilling ordinances was directed entirely at the Alamo Church associates. Fort Smith, Van Buren, and Alma all conceded that no one other than individuals affiliated with the Alamo Church congregations had ever been charged with violation of the ordinances.[4/] The numerous arrests of Alamo Church associates were for placing handbills under the windshield wipers of parked, unattended cars. During the course of the arrests, several of the arresting officers

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[4/] Plaintiffs acknowledge that there has not been an arrest or prosecution in Dyer under that municipality's anti-leafleting ordinance.

made derogatory comments regarding the arrestees and the literature that was being distributed.

Fort Smith City Attorney Wyman Wade acknowledged in his deposition that all of the individuals he has prosecuted for violation of the handbill ordinance were affiliated with the Alamo Church organizations. Van Buren City Prosecutor, Steven G. Peer, acknowledged that he has prosecuted individuals affiliated with Alamo Church organizations for violation of the handbill ordinance in Van Buren. Peer is also City Prosecutor for the City of Alma and he acknowledged having "prosecuted persons affiliated with Tony Alamo organizations for violation of the handbill ordinance in Alma, Arkansas." Although there is no record of any actual arrests or prosecutions under the handbill ordinance in Dyer, Dave McAdams was threatened with arrest in Dyer for violation of the handbill ordinance.[5/]

While Alamo Church associates were the only ones arrested and charged with violation of the handbill ordinances, they were not the only ones who distributed handbills by placing them on the windshields of parked cars in these Arkansas municipalities. Ray Hodnett, a defense attorney, testified that "no one else [other than Alamo Church associates] has been arrested for violation of this ordinance. I know that other people communicate or disseminate information in the same manner. Various Pizza Huts, and that sort of thing." Another defense attorney, Roy

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[5/] Dyer misrepresents the record below in asserting that there is no record support for the contention that individuals feared arrest in Dyer. Don Sweat, the class representative, identified Dave McAdams as an individual who had been threatened with arrest in Dyer.

Gean III, testified that he knew of pizza establishments that distribute literature by placing advertisements under the windshields of cars, that he personally had witnessed leaflets left on cars parked on public streets by a church not affiliated with the Alamo Churches, and that he has seen the handbills of small mom and pop stores on cars.

Fort Smith Police Corporal Ricky Sisson sought to explain away this selective enforcement by claiming that Fort Smith only enforces the regulation if it receives a complaint. One municipal official explained what was happening best, noting that while he finds Alamo Church literature "tremendously" objectionable, he "doubt[s] that [people] would have the same feeling toward Domino pizzas as they would towards the Alamo Foundation."

Incredibly, although the ordinances plainly do not make it unlawful to distribute handbills on private property if affixed so that they do not blow away, Alamo Church associates were repeatedly arrested for doing this. This repeated misapplication of the law reveals that the true purpose of the municipalities was to persecute the Alamo Church associates and to suppress their speech.

Although the municipalities assert that the handbill ordinances were enacted to prevent litter, the record was void of any showing that litter had increased, that the litter was caused by the handbilling, that the litter resulted in any increased cost or inconvenience to the city, or that any other means (such as enforcing anti-littering statues or purchasing additional trash cans) had been considered by each municipality. Indeed, all evidence in the record demonstrated that it was not the individuals who distributed the handbills who caused litter, if there were any, but rather that it was individuals who subsequently removed the handbills from the windshields and threw them to the ground

that caused the litter. Of the handbill ordinances, only the Alma ordinance included any statement of legislative purpose, and that statement does not refer to litter but rather complains of "the vast amount of handbills and other pamphlets being left on the public and private portions of the City of Alma, Arkansas." (85a, Section 6 of Alma Ordinance No. 83-3)

As one Alamo Church associate who participated in "tracting" explained, "We don't do any littering." This is because the Alamo Church associates place each tract under the car windshield wiper, where it stays until the intended recipient removes it. The associate asked at deposition, "Why not arrest the people that throw them on the ground? If I get a newspaper and I throw it on the ground, they don't arrest the newspaper company, they come to me. So I think that it should be the same with the gospel literature, put it in your vehicle or dispose of it or read it or whatever." Significantly, he noted, "many people do read it."

Mason Childers, the Van Buren Police Chief, testified that he was not aware of any littering problem in Van Buren caused by pamphlets throughout his entire career. He explained, "The only littering problem that I am aware of is there's been some times, and they're very far and few in between, is maybe at the edge of town someone will go out and dump maybe a truck load of old furniture or trash or something."

Indeed, all evidence demonstrated that it was not the handbillers who caused any litter. Gary Perry, a city council member in Alma in 1983 stated that the anti-leafleting ordinance was passed "[b]ecause of the problem of distributing literature on the windshields or whatever on people's vehicles and when they came out instead of taking those and putting them in their vehicles, they were just

throwing them all over the community of Alma. And, you know, Alma is a nice city. It will remain a nice city." Manford Burris, former Mayor of Alma, noted, "[b]ecause people would have a tendency, you know, to not even look to see whether it was an ad, a political ad, something from the [Alamo] Foundation, or anybody. They'd just, well — you know, throw it down on the ground and then we've got to clean it up, you know." Similarly, Alma Mayor John Ballantine explained, "Well, most people — I know myself, I drive a Corvette Sting-ray and I don't want people sticking stuff all over it. And if I don't want it, the first thing — my reaction is when I walk up there and it's on my car, I trash it. I throw it down on the pavement. Well, you get thousands of these put out there on a car lot or a parking lot or a church parking lot or wh[er]ever — the natural reaction of any person is that they're not going to read it. They're going to throw it down on the ground. Well, then what happens when the wind blows and you've got all of this stuff piled up, either on somebody's parking lot or out on the city street. But if, you know, now if you [hand] it to somebody, and I've read their literature — if you [hand] it to somebody, more than likely if they accept it, they're going to read it and they're going to put it in the car and take it with them, dispose of it later at, you know, at a convenient place."

The Proceedings Below

After several amendments to the Complaint and the subsequent class certification, plaintiffs brought a motion on October 18, 1996 seeking a declaratory judgment that the municipal ordinances were unconstitutional. Also on that date, Dyer, Alma, and Van Buren brought motions for summary judgment and for judgment on the pleadings and defendant Fort Smith brought a motion for judgment on the

pleadings.

By Judgment and Memorandum Opinion dated November 27, 1996 (34a-64a), the district court granted all of the municipalities' motions for judgment on the pleadings and denied plaintiffs' motion for declaratory judgment. Finding that the handbill ordinances left open alternate means for distribution by hand delivery and that the governmental interest in preventing litter was strong, the district court rejected plaintiffs' claim that the ordinances were unconstitutional. The district court further granted Dyer, Alma, and Van Buren's motions for summary judgment, finding that plaintiffs did not come forward with evidence of selective enforcement or discriminatory intent.

By Memorandum Opinion and Judgment dated July 30, 1997 (Ft. Smith 23a-29a), the district court granted a motion for summary judgment brought by Fort Smith, dismissing plaintiffs' selective enforcement and discriminatory purpose claims against Fort Smith. The court found that plaintiffs did not come forward with sufficient facts to support their claims against Fort Smith.

On August 28, 1997, plaintiffs timely filed their Notice of Appeal (81a) appealing the November 27, 1996 Order and Judgment and the July 30, 1997 Memorandum Opinion and Order.

In its opinion and order of November 30, 1998, the Eighth Circuit Court of Appeals held that the anti-handbilling ordinances were facially unconstitutional because they were not narrowly tailored as required by cases such as *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1980). As the court explained:

> While we have no difficulty in concluding that the inconvenience of having to dispose of

> unwanted paper, "is an acceptable burden, at least so far as the Constitution is concerned," *Bolger*, 463 U.S. at 72, that minor inconvenience is not even necessary in the present case because, like the householders in *Martin* and *Rowen*, those who do not wish to be left with handbills can quite easily notify distributors of that fact. As the Supreme Court reasoned in *Martin* and *Schneider*, defendants' goal of preventing litter can be accomplished by punishing the handbill distributors who defy such notices, as well as the "litterbugs" who choose to throw papers on the ground. *See Martin*, 319 U.S. at 147 ("A city can punish those who call at a home in defiance of the previously expressed will of the occupant."); *Schneider*, 308 U.S. at 162 ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street.").

(18a) As an alternate basis for its decision, the court of appeals held that the municipalities had failed to come forward with evidence in support of the ordinances. The court explained, "[D]efendants have not established a factual basis for concluding that a cause-and effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." (19a) Because the court of appeals found for plaintiffs on the grounds described above, it did not address respondents' additional arguments. As the court explained, "Having therefore determined as a

matter of law that the ordinances are facially invalid on overbreadth grounds, we need not address plaintiffs' remaining arguments on appeal concerning their claims of selective enforcement and discriminatory enactment." (20a)

In its Opinion and Order of November 30, 1998, the court of appeals also rejected Dyer's argument that the plaintiffs lacked standing to challenge that city's ordinance because no one had been arrested in Dyer. (8a-10a)

The municipalities' petitions for rehearing and suggestions for rehearing en banc were denied on January 29, 1999.

On April 13, 1999, the court of appeals granted, in part, respondents' motion for an award of attorneys fees and expenses under 42 U.S.C. § 1988 for legal services performed on the appeal.

REASONS WHY THE PETITIONS SHOULD BE DENIED

I. The Court Of Appeals Followed Well Established Precedent In Holding That The Anti-Handbilling Ordinances Are Unconstitutional

The court of appeals had "no difficulty" (18a) holding that the municipal ordinances were unconstitutional because the "minor inconvenience" of having to dispose of unwanted handbills, "is an acceptable burden, at least as far as the Constitution is concerned." (*Id.*) Moreover, the court held, even this burden can be further minimized by car owners who post a note in their windshield indicating that they did not want handbills (*id.*), just as homeowners post "no solicitation" signs on their property pursuant to *Martin* v. *City of Struthers*, 319 U.S. 141 (1939), or notify advertisers

that they do not desire certain mailings pursuant to *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970); *see also Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983). This rule appropriately balances "the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors . . . ." (14a, *citing Martin*, 319 U.S. at 146-47.)

There is no basis for certiorari review here as the court of appeal's decision is firmly rooted in established Supreme Court precedent. Moreover, petitioners identify no conflict with authorities or other "compelling reasons" for granting certiorari. The court of appeals' decision is consistent with longstanding precedent holding that the peaceful distribution of political or religious leaflets is a fundamental right at the core of the First Amendment. *See McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995) (Ohio ban against anonymous campaign literature was unconstitutional as applied to leafletter); *Lee* v. *International Soc'y for Krishna Consciousness*, 505 U.S. 830 (1992) (leafletting at airports was constitutionally protected even where solicitation of funds was not); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943) (city could not ban door-to-door distribution of religious leaflets); *Jamison* v. *Texas*, 318 U.S. 413(1943) (city could not ban distribution of religious leaflets under anti-solicitation ordinance even where leaflets included solicitation of sale of religious texts); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (city could not ban peaceful distribution in Catholic neighborhood of religious literature that virulently attacked the Catholic Church and religion); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939) (leafleting could not be banned in order to prevent litter); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938) (city could not

ban distribution of handbills).

The decision below recognizes the firmly established principle that government may not substitute its judgment for that of the recipient of a communication as to whether the recipient desires to receive it. In this regard, the decision vindicates the well-established rights of individuals to receive literature, as well as the rights of those who distribute it. (17a, *quoting Bolger*, 463 U.S. 60, 72 (1983) ("[W]e have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended"); *see also Martin* 319 U.S. at 143-44 ("The ordinance . . . substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it."). In holding the municipal ordinances unconstitutional, the court of appeals simply followed the well established rule that restrictions on speech may not, "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989); *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). Thus, the court of appeals' decision set forth no new rules and strayed from no established precedent. Rather, it is in good company with other similar cases such as *Schneider*, *Martin*, and *Bolger*. Accordingly there is no basis for granting certiorari here.

In their Petitions for Writ of Certiorari, the municipalities argue that banning the distribution of handbills by placing them under the windshield wipers of parked cars is a reasonable means to curtail litter. They further argue that the right to distribute handbills extends only to distribution to "willing" recipients, and the

municipalities conclude that in the absence of the automobile owner's explicit approval, it must be presumed that there is no willing recipient. These contentions, however, disregard fundamental precedent of this Court. Moreover, they utterly ignore the facts in the record in this case.

In *Schneider* v. *New Jersey*, 308 U.S. 147 (1939), this Court held that barring handbilling is not an appropriate means to curtail litter. As this Court stated:

> The motive of the legislation under attack . . . is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

* * *

> As we have pointed out, the public convenience in respect to cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.

308 U.S. at 162-63.

This holding was explicitly reaffirmed in *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), in which this Court upheld a municipal ordinance barring placement of signs on public property, and explicitly distinguished those facts from the facts presented in *Schneider*. In making this distinction, the Court explained that while the signs in *Vincent* were the direct cause of the aesthetic harm, it was improper to ban handbills as a prophylaxis to curtail litter because it was not the leafletters that caused the litter but rather the subsequent acts of those who litter. Thus, the *Vincent* Court stated:

> With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In *Schneider*, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil – visual blight – is not merely a possible

> by-product of the activity, but is created by the medium of expression itself. In contrast to *Schneider*, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Vincent, 466 U.S. at 810.

The municipal ordinances at issue here do precisely what *Schneider* and *Vincent* prohibit, they seek to curtail litter by restricting the distribution of handbills, rather than by enforcing legislation against littering. As the court of appeals below explained, because such an approach deprives even individuals who desire the literature and individuals who would not litter from receipt of the information, they, "suppress considerably more speech than is necessary to serve the stated governmental purpose of preventing litter." (18a)

Heffron v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981), provides no support for the petitioners because the specific limitation on handbilling in that case was narrowly tailored to achieve its purpose. *Heffron* upheld restrictions on handbilling along the midway of a state fair, requiring instead that the literature be distributed from a fixed point. The holding was based on the "special attributes" of the crowded state fair, 452 U.S. at 650, where there was a pressing need to address, "the flow of the crowd and demands of safety," *id.* at 651. The Court explicitly contrasted the particular exigencies required in the state fair with those of public streets. *Id.* As noted below, the municipalities here have made no factual showing

demonstrating any need to limit the distribution of handbills on the public streets, for the purpose of curtailing litter, or otherwise.

The municipalities seek to distinguish *Martin, Schneider* and *Vincent* on the grounds that those cases only held there was a right to distribute literature to willing recipients, and there are no willing recipients at unattended vehicles. Thus, the Cities of Alma, Dyer and Van Buren assert in their Petition that, "[T]he issue [in *Martin*] was whether the distributor could deliver the information to the homes of persons *obviously* willing to accept it." (Petition at 14 (emphasis added)). Of course, this Court made no ruling in *Martin* regarding how obvious one's willingness to receive literature needed to be. What *Martin* made clear, however, was that absent an indication to the contrary – such as by the posting of a no solicitation sign – it had to be presumed that the homeowner was willing to receive solicitations. 319 U.S. at 143-48.

In *Bolger* the postal service advanced an argument similar to the municipalities' contention that handbills may only be distributed to those who are "obviously" willing to receive them. The postal service suggested that the advertisers of contraception, "could send letters to the general public asking whether they would be willing to receive information about contraceptives, and send advertisements only to those who respond." This position, however, was rejected by the Court. As Justices Rehnquist and O'Connor explained in their concurrence, "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints." 463 U.S. at 79-80 (Rehnquist, J. concurring).

Petitioners alternatively seek to avoid the import of

Schneider, *Martin*, and *Bolger* by contending that recipients of handbills are a "captive audience" and therefore the ordinances are permitted under *Lehman* v. *Shaker Heights*, 418 U.S. 298, 362 (1974). Of course, the recipients of the handbills are not a captive audience, as were the riders of the public buses in *Lehman*, because the recipients of the handbills may simply avert their eyes and discard the handbills. As this Court held in *Bolger*:

> The First Amendment 'does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech.' Recipients of objectionable mailings, however, may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' Consequently, the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least as far as the Constitution is concerned.'

Bolger, 463 U.S. at 72 (citations omitted).

The municipalities attempt to characterize the court of appeals decision as novel by contending that the decision effectively turns private automobile windshields into a public forum. This contention is very wide of the mark. First, public forum analysis applies to publicly owned property. *See Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983). The doctrine therefore is not applicable here in the manner urged by petitioners because the cars are private property (albeit parked on public streets, which are a public forum).

Second, the court of appeals' decision below no more

turns automobile windshields into a public forum than do the numerous cases preserving the right to engage in door to door solicitation have the effect of converting private homes into a public forum. Thus, *Martin* did not socialize neighborhood homes for the purpose of door to door solicitations. Rather, it reaffirmed the right of willing homeowners to receive solicitors and left it to unwilling homeowners to post a notice. The decision here does no more and no less than *Martin* in this regard. Similarly, even though this Court specifically held in *U.S. Postal Service v. Greenburgh Civic Association*, 453 U.S. 114 (1981), that a household mail box is not a public forum, the decision in *Bolger* explicitly rejected the idea that, "Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." 463 U.S. at 72.

Indeed, the municipal ordinances at issue here each make specific provision for distributing handbills on private property so long as the literature is secured so as not to be blown away. Like the long-standing precedent permitting door to door solicitations, this portion of the ordinances does not make private property a public forum, and neither does the court of appeals' decision below.

As an alternate ground for its decision, the court of appeals held, "[D]efendants have not established a factual basis for concluding that a cause-and effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." (19a) Such a factual basis for the municipal ordinances is required by cases such as *Turner Broadcasting System, Inc.* v. *F.C.C.*, 512 U.S. 622 (1994) and *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *See also Cornerstone Bible Church* v. *City of Hastings*, 948 F. 2d 464 (8th Cir. 1991) (requiring city to

come forward with facts to support zoning ordinances that excluded churches from commercial areas). As the Court in *Turner Broadcasting* explained:

> [I]n First Amendment cases . . . deference afforded to legislative findings does not 'foreclose [the court's] independent judgment of the facts bearing on an issue of constitutional law.' This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo* or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences on substantial evidence.

512 U.S. at 666 (citations omitted). Similarly, in *City of Renton* this Court held, "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 52.

Although the municipalities asserted that the purpose of the ordinances was to curtail litter, respondents demonstrated that there was no factual basis for the municipalities' claim either that distribution of handbills caused litter or that the ordinances were directed at curtailing

litter.[6/] Thus, the municipalities did not submit any contemporaneous evidence reflecting the purpose of the ordinances or any inquiry by the municipalities to determine the nature, extent, or cause of the purported litter problem. Evidence submitted by respondents, including testimony from the Van Buren Police Chief, demonstrated that there was no litter problem at all. Additional evidence demonstrated that it was the recipients of the handbills, and not the distributors, who had caused any litter. Indeed, the Mayor of Alma admitted that when there are handbills on his car, his first reaction is to, "throw it down on the pavement."

Because the municipalities submitted no evidence to support the purported legislative purpose of the ordinances they must now resort to "logic" instead of the factual support required by *Turner Broadcasting* and *City of Renton*. Thus the Cities of Alma, Dyer, and Van Buren assert in their Petition for Writ of Certiorari:

> The problem addressed by the Ordinances was persons discarding handbills left under their windshields on private parking lots and public streets. It is logical to assume that the person discarding the handbill does not want it, and the best way to remedy the problem is to require the distributor to give it to the person who wants it.

[6/] As part of their discriminatory enactment and selective enforcement claims, respondents further demonstrated that the *true* purpose of the ordinances was to silence the religious and political message of the Alamo Church associates.

(Petition at 15)[7/] The trouble with such "logic", of course, is that it ignores the most common and logical scenario: the recipient desires the literature, reviews it, and then having taken in the information presented, discards the literature. The constitutional solution to the problem of a recipient of literature who then litters is enforcing the anti-littering statutes, not restricting the recipient's access to the literature. The failure by the municipalities to conduct any factual inquiry into the nature or extent of the purported littering problem or to make any inquiry into the various means available to the municipalities to address the purported problem dooms the ordinances because it demonstrates that each municipality failed, "in formulating its judgments . . . [to] draw[] reasonable inferences on substantial evidence." *Turner Broadcasting*, 512 U.S. at 666.

Because the petitioners identify no grounds for issuing a writ of certiorari and because the court of appeals' decision was firmly grounded in established precedent, the Petitions should not be granted.

II. The Court Of Appeals Appropriately Awarded Attorneys Fees And Expenses To Respondents As The Prevailing Parties Below

The petitioners identify no basis for granting their Petitions for Writ of Certiorari to review the court of appeals' award of attorneys fees. Petitioners rely upon the case *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), but that

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7/ The City of Fort Smith does not address this alternate holding of the court of appeals anywhere in its Petition for Writ of Certiorari.

case strongly supports the award of fees by the court of appeals. The Petitions on this ground are frivolous and commit the further vice of causing respondents to incur yet additional fees to respond to it here.

42 U.S.C. § 1988 provides for an award of attorneys fees and costs to a "prevailing party" enforcing the provisions of section 1983. Here, respondents were the prevailing parties as evidenced by the court of appeals' ruling which held the challenged ordinances facially unconstitutional. One measure of respondents' success was the court of appeals' decision not to address respondents' additional arguments that the ordinances were enacted for a discriminatory purpose and enforced in a selective fashion.[8/] It was unnecessary for the court of appeals to resolve these issues because, in holding the ordinances unconstitutional, the court gave respondents complete relief.

Relying upon *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), the petitioners assert that an award of attorneys fees was inappropriate here because there has not yet been a final determination in favor of respondents. This contention, however, belies a fundamental misunderstanding of the import of the court of appeals' decision which held, on the merits, that the municipal ordinances were unconstitutional.

The City of Fort Smith asserts in its Petition, "[T]he respondents here succeeded only in having the district

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[8/] The court of appeals stated: "Having therefore determined as a matter of law that the ordinances are facially invalid on overbreadth grounds, we need not address plaintiffs' remaining arguments on appeal concerning their claims of selective enforcement and discriminatory enactment." (20a)

court's granting of summary judgment reversed and having the case remanded back to the district court, presumably for a full trial of their cause." (Ft. Smith Petition at 24.) Similarly, the other municipalities contend, "Plaintiffs have essentially only been afforded the right to proceed to trial on the merits of their claims." (Alma, Dyer, Van Buren Petition at 22.) Other than a hearing for the amount of damages, however, there is nothing further to litigate here. Certainly, the court of appeals' decision bars the municipalities from again arguing to the district court that the ordinances are not unconstitutional.

For this reason, the decision in *Hanrahan* is readily distinguishable from the facts presented here. The appeals court in *Hanrahan* made no determination on the merits. Rather, it had overturned a directed verdict for the defendant and ordered a new trial. In contrast, here there has been a final determination as to the merits of the case and therefore attorneys fees are appropriately awarded to respondents as the prevailing parties. As the Court in *Hanrahan* explained:

> It is evident also that Congress contemplated the award of fees *pendente lite* in some cases. But it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. The congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases . . . . In each of those cases the party to whom fees were awarded had established the liability of the

> opposing party, although final remedial orders had not been entered.

446 U.S. at 757 (citations omitted). Thus, because respondents succeeded on the merits, the award of fees and expenses was proper.[9/] There is no basis for issuing a writ of certiorari.

III. The Court Of Appeals Correctly Determined That Respondents Have Standing To Challenge Dyer's Handbilling Ordinance

The City of Dyer argues that because no one has

[9/] The municipalities seemingly base their argument, in part, upon a strained reading of the notice of appeal from the original orders of the district court. They argue that the respondents here only appealed from a portion of each of the district court's orders, specifically those portions which granted the municipalities' summary judgment motions, and not from the denial of respondents' motions below. This however was not the municipalities' view of the respondents' appeal in their briefs to the court of appeals. The municipalities directly addressed respondents' facial challenge to the ordinances and never suggested that this challenge exceeded the permissible scope of the appeal. Indeed, in its "Statement of the Case", Fort Smith explained that, "Initially, Appellants present a facial challenge to the constitutionality to the Fort Smith ordinance." This argument therefore was waived and comes too late on a Petition for Writ of Certiorari.

actually been arrested under its handbilling ordinance, the respondents do not have standing to challenge the ordinance. One of the sub-classes certified below was those individuals who had been threatened with arrest under the ordinances and another was those individuals who feared arrest under the ordinances.[10/] Both of these subclasses have standing to challenge Dyer's ordinance.

In *Virginia* v. *American Booksellers Association, Inc.*, 484 U.S. 383 (1988), this Court held that plaintiff booksellers had standing to bring a pre-enforcement facial challenge to a statute which made it unlawful for sellers to

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[10/] Dyer contends that there was no evidence of anyone having been threatened with arrest in that community. The deposition testimony of Don Sweat, however, demonstrates that Dave McAdams was threatened with arrest in Dyer for violation of the handbill ordinance. This testimony was included in Appellants' Appendix at page AP239 and was relied upon by the court of appeals in making its decision (8a). Although Dyer included a portion of Mr. Sweat's deposition testimony in its Appendix to the Petition for Writ of Certiorari (95a-99a), this particular portion of the deposition testimony was excluded. The deposition testimony of Don Sweat states, in part, as follows:

> Q: Who has been threatened with arrest in Dyer?
>
> A: I'm still looking into that, but at present, Dave McAdams.

Deposition of Donald Ray Sweat at 72.

knowingly display sexually explicit material that was accessible to juveniles. The Court was "not troubled by the pre-enforcement nature of th[e] suit" noting that "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them." 484 U.S. at 393. The Court noted that because the defendant State had not suggested that the newly enacted law would not be enforced, it saw no reason to assume otherwise. *Id.*

There is ample evidence of respondents' standing here. Contemporary newspaper reports stated that Dyer's ordinance was passed in response to the distribution of literature by Alamo Church associates. Moreover, Dyer's vigorous defense of the anti-handbilling ordinance is substantial evidence of the vitality of the ordinance in Dyer and that community's willingness to enforce it and the fact that respondents' religious beliefs compel them to violate the ordinance has not been questioned. Moreover, individual Church members testified to their actual fear of arrest in Dyer, (103a), and other testimony demonstrated that individuals were indeed threatened with arrest in Dyer.

Steffel v. *Thompson*, 415 U.S. 452 (1974), is directly on point. In *Steffel*, this Court explained that a plaintiff need not be placed "between the Scylla of intentionally flouting . . . [the] law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid being enmeshed in a criminal proceeding." 415 U.S. at 462. Similarly, respondents here should not be put in the position of risking arrest or foregoing their constitutional rights. As this Court explained in *Secretary of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), in the First Amendment context, the standing rule that courts should avoid constitutional adjudication whenever possible carries less weight because, "Even where a First Amendment challenge

could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity." 467 U.S. at 956. The Court noted that under such circumstances, "Society as a whole then would be the loser," and held, "[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Id.*

Thus, the court of appeals properly determined that respondents -- who by the very designation of the sub-classes by the district court are individuals who have been threatened with arrest or who fear arrest -- had standing to challenge Dyer's ordinance, and therefore there are no grounds for issuing a writ of certiorari here.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

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Respectfully submitted,

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